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**Testing Emerging Land Use Concepts
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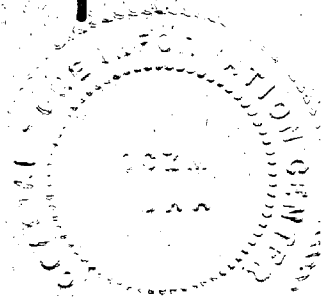
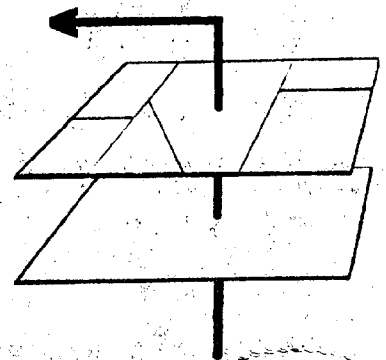
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Testing Emerging Land Use Concepts in an Urbanizing Region

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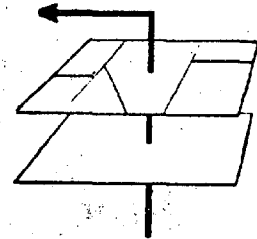
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INTRODUCTION
TO THE
TRANSFER OF DEVELOPMENT RIGHTS

The issues surrounding the use of land are important to public officials and private citizens. The recent attention to energy use has heightened professional, popular, and political awareness of the pattern of human settlement on the landscape.

Concern with the question of land use and the effect land use has on environmental protection is strong within several different professions; natural scientists and behavioral scientists are working in interdisciplinary teams. The efforts of these people have been augmented by legal experts and public servants. A sophisticated approach to land use is evolving. The approach must evolve because circumstances in the United States affecting land use have changed.

Although land is increasingly being considered as a commodity rather than a private resource, this shift in values is complicated by an economic necessity for development of land. In the United States the motive is maximized through land exploitation:

Public regulation, zoning, and subdivision is based on the police power - the right of the public to protect its health, safety, morals and general welfare. These values mean far less to private owners and developers than their own economic interests.¹

The creation and enforcement of environmental safeguards are, in some instances, challenged by individuals who desire more intensive land uses. Courts have contributed to the resolution of the controversy as some compensatory measures have been judged insufficient in comparison to the restrictions imposed on ownership rights; thus, the regulations are declared unconstitutional.

The United States is today as different technologically from the industrial nation of fifty years ago as that nation was from its colonial beginnings. However, the vehicle that has been used to control land use since the post-World War I era--zoning--has hardly been changed. Today's America is a country of more than 210 million people, of complex technologies, of intricately structured organizations, of high energy use, and of affluence. Land use controls are being modified today to meet modern demands adequately. One promising technique among the new generation of land use controls is *transfer of development rights (TDR)*. The basis for the TDR is the separation of the *commodity value of land*--such as its value if subdivided--from the *resource value of land*--such as agricultural use or preservation of historic sites. A real property owner is permitted to sell the commodity value to another landowner if he/she is prevented from utilizing it.

TDR may be employed in conjunction with or as a replacement for existing zoning regulations. The separation of *development rights* from other property rights and the *transfer* of them provides the means for preserving open spaces. In addition, owners of restricted lands are compensated by the sale of development rights. The right to intensify the use of land is no longer, then, considered inherent in the ownership of property. Creation of a TDR system requires:

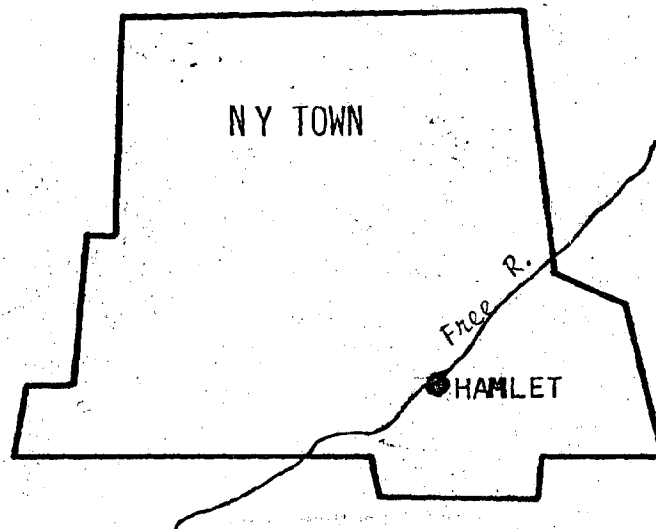
- analysis of the land and population within boundaries of jurisdiction;
- identification of the areas to be preserved;
- determination of the location and extent of developable areas;
- allocation of development rights to owners; and,
- Creation of incentives for the continued marketability of development rights.

Master plans can provide the basis for identifying the areas where more intensive development would be appropriate with provisions for such development determined by present and potential uses. In establishing restrictions on land, it may be necessary to prohibit any form of development on some sites, but in a majority of instances unarmful kinds of land use and land use for exploitation of natural resources would be permitted with accompanying economic returns preventing unreasonable hardships on landowners. Planning for increased development should be based on resource potentials to avoid incompatible land use patterns that cause strains on the environment and its inhabitants.

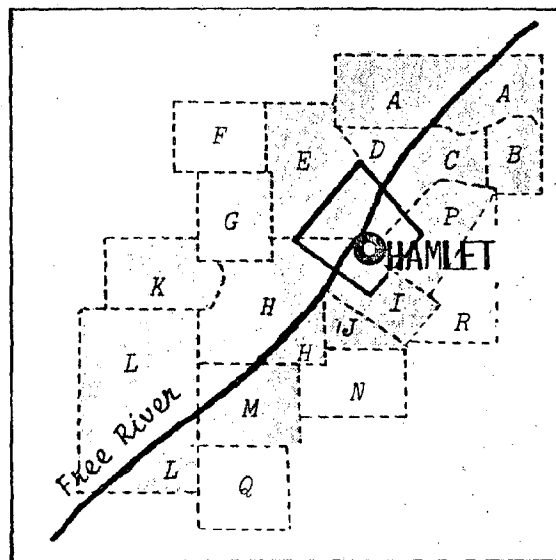
TDR: THE CONCEPT

TDR is new, and it is complex. It combines two legal aspects of land use control: (1) the state government's *police power*--the power to take measures to protect the population's health, safety and welfare--, and (2) the state's power of *eminent domain*--the power to condemn and take land for government purposes while fair market value for the land is paid. When the state uses police power to control land, it acts to prevent one landowner from harming the land of his neighbors. Police power controls generally do not require that the landowner whose land uses are restricted be compensated. Eminent domain, on the other hand, is used when the state wishes to use a landowner's property to benefit the community. For example, the state must exercise eminent domain when it wants to build a road across private property. Compensation is required in such a case because the owner's freedom in using that land is extremely limited, even though the community benefits.

Using the terminology and system developed at the SUNY College of Environmental Science and Forestry, an example of TDR follows:



NY Town is north of one of the State's expanding metropolitan areas. It is experiencing population growth. Many towns welcome the growth, but most townspeople want to regulate the increase. In NY Town, the residents wish to preserve the agricultural land around Hamlet and along a segment of the Free River. They first decide what part of the area they wish to plan for. There are several small farms and other parcels of vacant land surrounding Hamlet:



The gray area indicates the area to be preserved. This is called an *integrated district*. Several different landowners have property in the area. The lines in this case were drawn an average of 3000 feet on either side of the Free River, and they were drawn to exclude some property owners for administrative simplicity.

The people in NY Town want to concentrate population growth around Hamlet where public sewerage, water and roads are already available. They wish the rest of the land in the integrated district to remain open and in farms.

The black line surrounding Hamlet delineates the area to be developed from the area to remain open. The land within the green line is called an *active land use district*; the area outside the green line is called a *passive land use district*. The development that might have occurred in the passive land use district is channelled into the active land use district. Not all towns will find that the active land use districts need be contiguous with their companion passive land use districts.

All the property owners in the diagrams, except *F*, *N*, *Q*, and *R* who have been excluded from the integrated district, are given *development rights*; the amount of such rights is dependent upon the value of the land and upon the plan governing growth adopted by NY Town.

In the diagram, it can be seen that landowners *C*, *E*, *H*, *I*, and *P* may still develop parts of their land. The others within the integrated district may not, with a few exceptions.

A restricted landowner in a passive land use district, say *L*, could sell his development rights to *C*, *E*, *H*, *I*, or *P* or landowners in Hamlet. If an active land use district landowner, say *H*, purchased them, she could build on the land and develop it more intensively than she could before she bought them.

Therefore, if *H* has one of her eight acres in the active land use district and she has purchased five residential development rights from *L*, she could then build five houses on that one acre. *H* could probably take the development right she received for her seven acres of land in

the passive land use district and transfer them to her land and use them in the active land use district. The Town would place the limit on the number of rights that could be transferred into an area and, thus, regulate maximum permitted density.

The price *L* would receive for his development rights would depend upon what the land market would pressure *H* into paying. The land *L* owns could still be farmed and he could still maintain his house on it. *L* could also sell his land after he had sold his development rights; however, the buyer would know, by examining the deed, that he/she would be buying the land without development rights.

Essentially, then, TDR identifies the right to develop; creates a market for such rights; and, it is expected, insures rational planning for orderly growth and development at low costs to the taxpayers and to the environment. Its purposes are to preserve open spaces and restrict land use by means of regulation rather than by outright government purchase. Inherent in the TDR concept is the idea that the right to develop land is quantifiable, transferrable, and separable from other conditions of property ownership.

TRADITIONAL ZONING: PROBLEMS

The most prevalent form of land use control in the United States has, since *Village of Euclid v Ambler Realty Co.*, been zoning. Traditional zoning has been plagued by a number of problems. Most of these problems stem from the fact that zoning is essentially negative.² That is to say, it has largely been employed as a method of excluding undesirable elements from the neighborhoods of the powerful, rather than as a sound and comprehensive land use planning device. Zoning has not, for example, prevented the urban sprawl syndrome, nor has it kept prime agricultural land from being developed and thereby lost. It has not protected valuable ecosystems, such as tidal wetlands, from being destroyed.

Zoning was never meant to accomplish these last functions. Today, land use has become more critical, and, therefore, controls must encompass all land use interests.

Another problem with zoning today is that it creates what are called *windfalls* and *wipeouts*. If a landowner has a piece of land zoned to allow only agricultural use, and it is subsequently zoned for development, he/she can make a great deal of money out of the situation; hence, a windfall. However, if land one had intended to build upon is subsequently zoned for open space, or some other unintensified use, one loses an investment and experiences a wipeout.

IMPLEMENTATION OF TDR

The implementation of TDR is complex. What is required first is a comprehensive, long-range, master plan. A plan might include the establishment of a planning district; *i.e.* a county, group of municipalities, a town, a village, or a part of a municipality. The district might best be a natural region bounded by rivers, mountains, or the sea. Or, it may be a political one such as a school district. A plan for land uses and their allocation to land areas within the district would then need to be designed. This is essentially the same procedure as with zoning.

The development rights would next be quantified and allocated. Each landowner would receive a share of development rights. However, the landowner in a passive land use district could not use all of those rights on his/her piece of land. The landowner could only use those rights which would be consistent with the master plan, and he/she could sell the rest. Usually, in a passive land use district, the owner would only be permitted to maintain a primary dwelling.

It is possible to define various types of development rights, *e.g.* residential, commercial, or industrial. Development rights may be allocated on the basis of acreage of land owned and/or present assessed valuation. The TDRs would be recorded and the records maintained and indexed by an officer such as a town clerk, as are deeds. Thereafter, development rights could be sold or otherwise assigned and transferred.

A developer, then, would have to own both the appropriate piece of land and the necessary rights to develop it to the density he/she would wish. The price of development rights would be determined by the demand

in the market.

Taxation of a development right would depend on its valuation. When the development rights are sold from a piece of property, the valuation of that land would drop by the amount paid for the development rights. In other words, the resource value of the land would be taxed separately from its commodity value.

Once a development right is 'used' through construction of a house, say, it becomes 'retired.' If the landowner should subsequently raze the house, then the development right would be 'rejuvenated.' If, in the future, a community decides that more development is feasible and necessary, new additional rights could be issued. These would be allocated to landowners of records in the same manner as were the first development rights. Development could also be spread out over time by setting dates on which development rights would become valid. This scheduling would be in accordance with the expected availability of public facilities and services.

Liabilities of TDR

As with any largely untried law or program, the problems associated with it are not yet well defined. David Levin, in his article, 'Eminent Domain Proceedings in the United States' says about TDR:

Their weaknesses...stem from the lack of their widespread application in many areas; from the fact that they are not popularly understood very easily; from the difficulties of setting a price tag on their value in the open market; and from the opportunities they afford for partisan interests to misrepresent their impact on grantors or donors.³

Other problems associated with a TDR program include the necessity of a well conceived long-range master plan, which can be expensive. They would also necessitate the establishment of new laws and an adaptation of the administrative system concerned with land including title and tax.

A TDR plan, while alleviating the existing windfall/wipeout phenomenon, might create its own windfall situation. For example, A owns land

worth ten thousand dollars per acre. A's land is then zoned for environmental purposes. A could sell his development rights to C for, say, \$1000 apiece. B offers a bit more than C whose land is not as valuable. B then, for just a few more dollars, can develop his already valuable land and 'make a killing.' This is a windfall to B. It is also an alleviation of a wipeout to A. Whether or not it is fair is questionable. Certain TDR plans obviate such a possibility by allocating development rights to lands that could be developed; existing laws that preempt development on a parcel of land would also preempt the allocation of development rights to that land.

These are all potential problems that would have to be considered if a TDR plan or ordinance is written. It could be written to alleviate these possible liabilities by a knowledgeable group of decision-makers.

Benefits of TDR

One of the expected benefits of the implementation of a TDR program is the protection of the long-range master plan. There will be few provisions for variances, as with zoning, which disrupt the master plan.

There will be less competition among landowners, since the land use pattern will be defined. The speculative value of land will, therefore, not rise as high. Another possible benefit is the reduction of the windfall/wipeout phenomenon, since the plan would not inflate the value of anyone's land. For instance, landowner X owns 100 acres of marshland which he or she wishes to fill in and develop. The planning board of X's municipality writes a zoning ordinance which forbids X to touch this valuable environmental resource. X has experienced a wipeout since X's land is of no commercial use to him/her.

On the other hand, if Y's land, across town from X, has been zoned for industrial use, Y may now have land worth even more than before the ordinance was passed. Y has therefore experienced a windfall. Under a transfer of development rights plan X's 'wipeout' would not be as severe, since X would be able to sell the development rights to, say, Y, and thus be at least partially compensated for his or her development restriction.

On the other hand, Y, whose land was zoned industrial, would be forced to buy development rights in order to develop his/her land. Also, the selling price of the land would be affected by the mandatory purchase of development rights before development could take place, thus obviating the windfall phenomenon.

A very important potential benefit that should accrue to the whole community from a TDR program is overall environmental quality. That is to say, there would be more open space. The adherence to the master plan would prevent development on valuable land such as timberland, agricultural land and mining land. This land use control institution would protect the future landowner, too.

PRECEDENTS

There is substantial precedent for the concept of the transfer of development rights. Both the British and American land use legal systems have antecedents to it, despite essential differences in policy between the two countries.

The British System

In 1909, the first Town Planning Act was passed by the British Parliament. It was deemed necessary because of the unsatisfactory layout of towns and the decline in the quality of urban life caused by the dramatic population increases in the cities during the Industrial Revolution. The Act conferred some powers on local authorities to regulate development, especially in relation to roads, sites for public requirements and prevention of neighboring incompatible uses. These powers were extended in the Town and Country Planning Act of 1932 to include all land, rural and urban.

Depression and unemployment became severe by the mid-1930s; Parliament then ordered the establishment of the Royal Commission to Consider the Distribution of the Industrial Population in 1938. This resulted in what is popularly termed the *Barlow Report* in 1940.⁴ This report recommended that the location of industry be controlled nationally to effect decentralization of population needed to correct manifest disadvantages of overly large urban areas.⁵ The Town and

Country Planning Act of 1943 was passed to meet this need. It extended planning control to the whole country. Regional plans were commissioned for post-war action to replace bombed areas.

The most influential and pertinent legislation to the transfer of development rights was the Town and Country Planning Act of 1947. This act imposed a universal restriction in requiring that planning permission be obtained for any 'material' change of use or other development. A fund of 300 million pounds was to be set up to pay, on a once-only basis, for the development value of the land--the value estimated on July 1, 1948. The government indemnified the landowners in the event that it should make decisions affecting private land that they would deem confiscatory and for which, therefore, they would demand compensation. In other words, the government was arranging to buy all the development rights in England and Wales. The *right to make decisions concerning development* became the national government's prerogative. To develop, one had to buy the right from the government which could refuse to sell development rights for a particular parcel of land. The charge for development permission soon came to be treated as no more than an arbitrary tax, and it was abolished in the Town and Country Planning Act of 1953.

The British development rights transfer concept was tried again, in more intricate form, in 1964; it was, however, again abolished in 1971. Britain still lacks an effective and efficient system of land use control. The problems of compensation and betterment remain.

As R. E. Megarry said in his article 'Compensation for the Compulsory Acquisition of Land in England':

The basis upon which compensation for the refusal of planning permission may be claimed is no logical and coherent policy, but the outcome of changes in a wider policy and can be explained only as a matter of legislative history.⁶

The American System

Protection and preservation of land in America comes under two different constitutional concepts: eminent domain and what is known as the police power. It has been noted that both are aspects of TDR.

Eminent domain involves the taking of property for a public use and compensation is paid to the owner. The police power, on the other hand, involves a suppression or limitation applied to the property in the owner's hands, in order to protect the public health, safety, morals or general welfare of the community against dangers arising, or likely to arise, from the misemployment of the property. Compensation is not paid to the owner.⁷

Zoning, therefore, is an act of the police power, while the right to appropriate private property comes under eminent domain. Precedents for the transfer of development rights are found by examination of early uses of these two concepts.

Transportation Systems

In the 1700s and 1800s, states authorized private corporations to build and maintain roads. They were given the rights-of-way, with the government paying due compensation to the landowners, to keep road costs low. This is the power of eminent domain; later it was extended to canal and railroad builders. Thus, a precedent was established for the transfer of certain property rights in the public need. The public need in this case was defined both as something that the public consumed directly--as a passenger on a railroad train, for instance--and as that which benefitted the *public utility*, or the general welfare of the people as a country, state, municipality or community. These benefits were considered in terms of 'progress'; i.e. opening the frontier. This was certainly of economic benefit to the country as a whole.

The idea of appropriating the rights-of-way over land is also evidenced for common carriers such as pipelines and public bus and trucking systems; it is done in the name of public utility. Thus, American history provides several precedents for the separation of some of the 'bundle of rights' that goes with ownership of land.

The Milldam Acts

The Milldam statutes authorized millers to dam streams and harness power to grind their grain. They paid the upstream owner whose lands were flooded. The miller bought what might be called the

'right to flood.' In return to the community for that right, no one could be refused if he/she wanted grain ground at that mill. An established portion of the flour produced was the fee. The dam also represented a source of energy. It, therefore, combined a public user and public utility. For these reasons, a grant of eminent domain to a private individual was considered valid. The Milldam Acts have a relationship to TDRs because, possibly, the 'proper management of land resources by the use of development rights may produce major, beneficial multiplier effects.'⁸

Drainage and Irrigation Projects

Drainage and irrigation projects were administered so that those property owners who benefitted the most from the project would pay the most. Also, those who were deprived of the use of their land because of the project were compensated with the money from those who profited.

Again, the prevailing theme is that the general public utility is being served by the multiplier effects of resources being put to use. Since there is a communal benefit from the action, it is done in the general public interest. Despite dissent from part of the community, the minority that benefits only slightly by the project, the entire community must share the total cost.

With the use of TDR, planning analysis and control could be greatly improved; in addition:

exigencies and commonality of resource use within the development rights districts would certainly seem as high as those found adequate to justify the assessment processes of the irrigation districts.⁹

Oil and Gas Production

Another American precedent for the transfer of development rights is in the regulations covering oil and gas production. The law says that an owner is entitled to the oil and gas that lies underneath his/her land, even if a neighbor gets the resource out of his/her wells.

In the nineteenth century, this prompted a 'pooling of resources and an equitable system of development rights among the co-owners...¹⁰

This law also helped to prevent waste of the valuable natural resource, oil. TDR would, ideally, help to prevent waste of another valuable natural resource, open space.

Easements

Also in America, there is precedent set by the government acquisition of rights less-than-fee-simple for development, such as the installation of utility poles. Fair compensation is paid. Another form of this is found in *conservation* or *negative easements*. This does not make the land public; it merely prohibits development. The landowner is agreeing not to build on a portion or all of his or her land. An easement agreement is attached to the deed and is not negotiable in the future. The concept inherent in easement:

has been extended to permit government acquisition...of only the right to develop the land, leaving the owner with all other rights of ownership.¹¹

EXISTING AND PROPOSED TDR PLANS

There are a few examples of TDR plans being implemented, and there are others suggested for implementation in the United States today. These plans can be used to accomplish various purposes including the preservation of:

- fragile ecosystems
- agricultural land
- open space
- the master plan, and
- historic sites

One of those suggested for the preservation of fragile ecological resources is the Puerto Rican Plan.

Puerto Rico: Proposed

In Puerto Rico, there are sites that are each unique in terms of ecological importance. Two such sites are the Phosphorescent Bay on the south coast and the El Faro district on the northeast coast.

The present Planning Law does not protect those areas.

The problems with environmental preservation in Puerto Rico include the lack of public funds and the governments' reluctance to impose stringent regulations on development in natural areas. Furthermore, land values in Puerto Rico are high, and public purchase of valuable, environmentally sensitive areas is not feasible. It has been suggested that the best way of preserving the beauty and important natural areas of the island is through a TDR program. The proposed plan of action consists of four steps.

First, an inventory of potential *Protected Environmental Zones (PEZs)*--such as the Phosphorescent Bay--would be prepared. Each PEZ would have its own 'tailor-made' regulations to meet its special requirements. This would be prepared by the Planning Board. It would not necessarily mean that all development would be excluded from PEZs, but that development would be restricted to prevent environmental damage.

Secondly, the Board would identify *transfer districts*: areas where development could be intense. These would be mapped and development rights would be sold for use within these districts. Suitable areas for these transfer districts could be underdeveloped sections of the cities. These areas would not require an overly expensive new system of basic services, such as sewage treatment and transportation systems, since they are already within reasonable reach of existing facilities.

Third, is the establishment of an *Environmental Trust Fund (ETF)*. The ETF would be administered by a Land Administration which would be an agency developed to administer the plan. It would be funded primarily by the sale of development rights of parcels within PEZs and supplemented by gifts and federal grants. The Fund would be responsible for keeping track of development rights transfers. Fourthly, the fund would adjust injustices which may result from implementation of the plan through monetary awards, liberalization of PEZ regulations, or other means.¹²

The problems with the plan are mostly ones of legality. It is not clear whether the plan is constitutional or whether the restrictions imposed under the plan come legitimately under the police power. However, it is felt by the authors of the plan, that the preservation of the beautiful areas on the island is important enough that the plan should be implemented on at least 'a limited demonstration basis¹³

Alaska, Matanuska-Susitna Borough: Existing

In Alaska's Matanuska-Susitna Borough, an ordinance states how land shall be sold by the borough within the borough. In section 11, it states:

Rights in land to be sold

The following rights in agricultural classified land shall be sold: all rights except mineral rights and development rights. Development rights are the rights to subdivide or use the surface of the land for residential, commercial or industrial uses which are not part of the farming enterprise conducted on the land.¹⁴

The intent is to protect those areas in this Alaska borough which are suitable for farming. Agricultural land is usually good for building, as it has good drainage and moderate relief; such lands are especially susceptible to development. The ordinance is not actually a development rights transfer act, but one that prevents development rights from being sold.

Florida, Collier County: Existing

In Collier County, Florida, an ordinance¹⁵ that permits the transfer of development rights was passed in 1974. The main purpose for instituting the ordinance was to preserve areas of environmental sensitivity such as mangrove swamps, coastal beaches, estuarine areas, tidal and freshwater marshes and natural drainage courses. The ordinance states that those lands designated as *Special Treatment Districts (STs)* may transfer their development rights to a neighboring property not designated ST. Also, no lands that are ST lands may be

used in such a way that the ecology of the area would be damaged substantially.

An owner of ST-designated land, therefore, may choose to transfer all his/her other development rights rather than use the land in conformity with ST regulations. If this latter course is chosen, the transfer must be to land not designated ST, and it must be to land that has at least one point of contiguity with the ST land. This last condition is different from the Puerto Rican plan which permits transfer over distances with no connecting point necessary.

Furthermore, the ST land must be used in conjunction with the land now having increased density. It may be used for limited recreation, open space, surface drainage, effluent polishing ponds (if, for example, the development is a water-polluting industry), scenic trails and protected wildlife habitats.

The records of transfer are to be maintained by the county clerk; the land title will have a covenant stating that no future alteration, building or development permit will be issued in the future.

New Jersey: Proposed

The New Jersey general Assembly passed Bill No. 3192, *The Municipal Development Rights Act* on May 5, 1975.¹⁶ The New Jersey senate turned it down. Since then, state enabling legislation was prefiled for introduction into the 1976 legislature. This proposed act is an attempt to supplement zoning focusing on the establishment of a method to preserve critical areas and maintain New Jersey's 'Garden State' image, despite its having the densest population of all fifty states. The act is not intended to disturb the existing structure of land use regulation. The administration of the act is left to the local governments.

Under the plan, development rights (DRs) are allocated according to land value rather than just on an acreage basis; the owner of open space land with a higher assessed market value would receive more development right certificates than the owner of less valuable land. An owner would then be able to sell his/her certificates of

DRs to someone who wanted to develop land to higher density.

The DRs would be taxed, since they are real property. Although there would be a rearrangement of the ratables, the tax base of the municipality should not be changed significantly. As Jerome Rose says in explanation of this concept:

When the ordinance is first enacted, the aggregate value of all outstanding development rights will be the difference between the value of all residential land if fully developed with development rights and the value of the same land for restricted residential development.¹⁷

As soon as sales actually take place, market value will provide the criterion for reassessment, and the rights will be taxed accordingly.

The DRs would, as is real property, be privately transferrable. One could sell, inherit, or bestow them. They would not, as in the Puerto Rican Plan, be controlled by the government.

Furthermore, the model enabling legislation says that adoption of a TDR system would be optional and would be decided upon by each municipality. This is not true of the Puerto Rican Plan which would encompass the entire island.

New York: Proposed

In New York State an act was introduced to the legislature by Assemblyman Alexander B. Grannis (D-68) in July of 1975. This act would amend the General Municipal Law to provide for the transfer of development rights. It, like the proposed New Jersey Act, would leave the power in the hands of local governments and make adoption of the act's provisions optional. The problem with the act in its present state is its lack of specificity. It is very brief which does not allow much procedural detail. Since TDR is relatively complex and new to local governments, it is probably desirable to include provisions for as many situations as possible. For example, the bill does not give guidelines on what basis development right certificates may be calculated and distributed. It does not discuss how DRs will be taxed or how a parcel of land will be treated in

terms of title, tax, and development after DRs have been either sold or bought. It does, however, make the underlying purposes of the act clear.

The purpose of this act is to preserve:

....distinctive areas and spaces of varied size and character, including many having significant agricultural, ecological, scenic, historical or aesthetic values...¹⁸

This is a collection of all the possible uses for the transfer of development rights.

The act puts the responsibility for the administration of the development rights transfer procedure in the hands of municipal planning boards or commissions. Transfer of development rights would be permitted only accompanied by a public hearing and, subsequently, with an approved application.

Oregon: Rejected

In Oregon, a bill was introduced (Senate Bill 27, 1975, Regular Session) and it stated simply that:

the county governing body may by ordinance provide for the transfer of development rights...from the parcel of land to another for the purpose of promoting development consistent with comprehensive planning goals for the country.¹⁹

This act is similar to the New Jersey Act, but is in a much simpler form. The intent is, as has been suggested, to encourage adherence to the long-range master plan of an area.

The bill was discussed on the floor of the Oregon Senate Committee on Local Government and Elections in January of 1975 and was dropped. It is unlikely that a TDR bill will be reintroduced in the near future.²⁰

Virginia, Fairfax County: Proposed

The proposed TDR plan for Fairfax County, Virginia would replace

zoning. The plan involves four steps. First, the Board of Supervisors (an elected body) will adopt a comprehensive master plan which will project the socially and environmentally desirable number of residents that an area could accommodate and the total projected amount of commercial and industrial area needed for the county.

Secondly, the Board would decide how many development rights are required for each category of use including residential, commercial and industrial. Not included would be farms, public facilities, conservation, recreation and power lines. Then the Board would assign these development rights in direct proportion to the number of acres owned, subtracting existing development. Thereafter, the developer would have to file his/her plans along with his/her DRs, the number of which must cover the proposed development.

The stated purpose of this plan is to control growth. It would probably do this, but to an unconstitutional extent. The plan has been found to be exclusionary since it does not provide an appropriate amount of low- and moderate-income housing.²¹

The development rights would not be taxed under this plan; farmers would, then, be taxed on present use of land rather than on the market value. This is a definite advantage for farming but could reduce the tax base. However, since all landowners would be compensated, it is more likely that the integrity of the master plan would be protected. And, since no rights are necessary for public facilities, the public could save tax monies for land acquisition.

It is unlikely the plan will be passed in the County. State enabling legislation would be required first, and the current Board of Supervisors has no interest in TDRs.²²

CONCLUSION

The variety of different uses of the concept of the transfer of development rights can be seen from this overview of some of the existing and proposed plans. The approaches vary because of different goals; they include plans for the preservation of fragile ecosystems,

open space, farmland, historic preservation and other amenities. TDR plans also differ on the basis of procedures and administration including taxation, allocation, and unit measure of rights.²³

It is easy to argue that development rights transfer--or purchase--is preferable to use of regulation for pacing development and providing buffers and greenbelts. It would help to avoid uncompensated preservation of land which may have confiscatory effects. This is known as the 'taking issue' which has been and continues to be one of the most difficult problems related to land use in the United States.

TDR could, ideally, alleviate the problems of potentially unconstitutional, overstringent residential zoning. Zoning, as has been seen, is rigid and is rapidly becoming an unsatisfactory method of land use control. Municipalities across the country have been accused of being exclusionary because of their overly zealous zoning. It is thought that by transferring development rights, zoning could become less restrictive upon landowners and municipal officials. Furthermore, while use of agricultural zoning is more forward, all zoning ordinances are subject to repeal and amendment when development pressures become too strong to resist. A development-right system of title would be, largely, as inviolable as present title ownership. It would, presumably, endure. Finally, TDR can probably help to avoid the necessity for huge expenditures of taxpayer's money for public acquisition in the preservation of open space amenities in land use. The tax base should also be preserved.

TDR is today a promising tool. Its potential to expedite resolution of conflicts between private land use and the public interest recommends it for consideration by municipalities. Its inherent problems and novelty recommend that consideration be thoughtful.

NOTES

¹ Jerome G. Rose, ed. *Transfer of Development Rights*. Rutgers University: New Brunswick, N.J. 1975 p. 275

² Cooperative Extension Service of the University of Maryland. *Transferable Development Rights*, College Park, Maryland, 1974, p. 1.

³ David R. Levin, 'Eminent Domain Proceedings in the United States,' from *Law and Land: Anglo-American Planning Practice*. Charles M. Haar, ed. Harvard University Press: Cambridge, Mass. 1964, p. 239

⁴ Royal Commission on the Distribution of the Industrial Population. *Report*. His Majesty's Stationary Office: London. Cmd. 6153, 1940.

⁵ W. O. Hart. 'Control of the Use of Land in English Law,' in Haar, p. 6.

⁶ R. E. Megarry. 'Compensation for the Compulsory Acquisition of Land in England,' in Haar, p. 181.

⁷ David W. Craig. 'Regulation and Purchase: Two Governmental Ways to Attain Planned Land Use,' in Haar, p. 181.

⁸ Rose. p. 32.

⁹ *Ibid.* p. 38

¹⁰ *Ibid.* p. 6.

¹¹ *Ibid.* p. 7.

¹² John J. Costonis and Robert S. DeVoy. *The Puerto Rican Plan: Environmental Protection Through Development Rights Transfer*. Washington, D.C.: Urban Land Institute, 1975. p. 9.

¹³ *Ibid.* p. 51.

¹⁴ Matanuska-Susitna, Alaska; Ordinance 75-15.

¹⁵ Collier County, Florida; Zoning Ordinance, Section 9.

¹⁶ New Jersey Assembly; Bill No. 118, Article 1, p. 2, lines 23-26.

¹⁷ Rose, p. 197.

¹⁸ New York Assembly Act, 8928, 1975-76. Regular Sessions.

¹⁹ Oregon Act; Senate Bill 27, 1975, Regular Session.

²⁰ John G. Houser. Legislative Research, Salem Oregon. Personal Correspondence, 6/24/76.

²¹Steven R. Woodbury, 'Transfer of Development Rights: A New Tool for Planners,' *Journal of the American Institute of Planners*. 41(January 1975): 9.

²²Mary E. Holbein, Assistant Director for Community Development, Dept. of Housing & Community Development, County of Fairfax. Personal correspondence, 7/19/76.

²³Woodbury. p. 11.

A CRITICAL LOOK
AT
TRANSFER OF DEVELOPMENT RIGHTS

The introduction of zoning in this country brought issues relating to the social control of land use into confrontation with culturally imbedded and constitutionally recognized concepts relating to the private use of land. Predictably, political and legal conflicts developed around zoning and have continued and intensified with expanding efforts to extend social controls over land use as they encroached increasingly on traditional rights in land. In this conflict situation, it is not surprising that there has been dissatisfaction on both sides with zoning as an instrument. Those who have experienced or who fear the reduction of their perceived rights in land have seen zoning as unconstitutionally depriving them of property without just compensation and, in many instances, as an important step in the road towards socialism. Not surprisingly, they have utilized every available political and legal strategem to combat zoning, both as a general system and in its particular application to their properties. Those who have seen increasing need for social control of land use, on the other hand, have tended to view zoning in application as a very imperfect instrument: incapable of accomplishing necessary social purposes because of the continuing strong cultural bent toward protection of private rights in land and the frequently successful political and legal efforts by landowners to maintain a favorable position relative to land use controls. Many planners, environmentalists, preservationists and others interested in extending social control over land use have been seeking both the extension of control through conventional zoning and the development of new processes which might facilitate pursuit of further social control. Preservation of prime agricultural land, protection of coastal beach and wet lands, preservation of historic buildings and meritorious architecture, pro-

tection of aquifers and pursuit of a no-growth philosophy are among the purposes for which extended social control of land use is currently sought. Such is the demand for better tools for land use control that ideas having any promise secure a ready audience and immediate attention in various journals concerned with land use controls and the various activities affected by land use planning. There is a tendency in this situation for innovative concepts to be advanced and accepted by an eager audience without adequate attention to the practical and legal considerations inherent in their application.

Since the idea of permitting, and indeed fostering, the transfer of development rights from one property to another under the sanction of law first received national attention in the 1960s, the concept has enjoyed considerable favor among planners, preservationists and environmentalists as a possible way of getting around the problems of the 'taking issue' in the course of severely restricting land use and development for socially desirable reasons. It has appeared to Audrey Moore,¹ and others, as the possible basis of an entirely new concept of land use control which might be substituted for rather than added to traditional zoning. However, it is not in this sense that we are interested here, but rather as an 'add on' to traditional zoning, as TDR is seen in most of the literature.

By considering development rights, under zoning, as transferable from one property to another, the developers of the concept reasoned that the severe limitation of development with respect to a particular property would be less onerous for the owner since he would retain development rights which, though they could not be utilized on the land, could be sold for use elsewhere. Hopefully, in the process of transfer, the owner would emerge nearly as 'whole' as his unrestricted neighbor.

Theoretically, he would thus be less motivated to take political action and/or seek judicial relief and be less likely to be successful in such efforts if he did resort to them. Since rights would not be taken but could be sold on the market, it is reasoned that the taking issue would be obviated. Under the TDR concept a municipality exercising zoning pursuant to adequate state enabling legislation might find a section(s)

of its area in which, for some good public purpose, further development should be discontinued, and the municipality would establish a special overlay zoning district preventing development therein. Various writers have referred to this as a *sending, conservation, protected environmental, special treatment or passive land use district*. It will be referred to here, with no particular brief for the term, as a *preservation district*. Owners in such districts would not be able to develop their lands but would be enabled, in the way of compensation, to sell their development rights to designated, suitable buyers. They could continue to occupy and form or carry on other uses not requiring development. To create a market of potential buyers, the municipality would locate and designate an area(s) of its territory to which the rights could be transferred by private transactions. Such areas have been referred to by various writers as *recipient, receiving, transfer or active land use districts*. They will be referred to here, again arbitrarily, as *recipient districts*. Owners of land in a recipient district would be designated, under suitable conditions, as legitimate buyers and users of the transferable development rights, but only in connection with owned land in a recipient district. If both preservation and reception areas were zoned for half-acre residential, for example, the recipient area owners might be permitted to purchase sufficient development rights to increase their permitted density by a given percentage, say 100 per cent, to develop, in this example, at four dwelling units per acre instead of two.

Unfortunately, most of the writing on TDR has been of a promotional nature, either by those who have invented the concept or developed modifications thereof, or by those who have eagerly seized upon TDR as a technique of the future. An important exception is Frank Schnidman's 'Transfer of Development Rights: Questions and Bibliography.' This document raises 146 very pertinent questions but unfortunately does not attempt to provide answers.² Despite the lack of adequate, critical appraisal, a number of efforts have been made to introduce the concept into local zoning, and general enabling legislation has been introduced in at least two states, New York and New Jersey, and is in preparation

in others.

It should be evident from experience with zoning that any major innovation in land use control is virtually certain to be accompanied by the same types of political strife, efforts at manipulation, administrative difficulties and litigation which have attended conventional zoning. Those developing and promoting new land use control concepts perhaps have an obligation to try to foresee possible problems with zoning innovations rather than concentrate almost exclusively on prospective benefits. This paper is an attempt, in the absence of such efforts, to examine critically the potential application of TDR in developing suburban areas to look for possible problems.

Since there has been little application of the concept, the method of the investigation will have to be speculative. This is accomplished by assuming a TDR ordinance has been prepared and adopted, presumably under adequate enabling legislation, in a suburban New York town, and that preservation and reception districts have been established by overlay on the zoning map. Effort is made to identify potential classes of actors relating to the application of the ordinance, and then to 'walk through' with each of them their interests and activities as potentially affected by the ordinance. The effect of such potential interaction is then compared with the intent of the ordinance. In doing this, I have relied in part upon past personal experience with zoning and, in part, upon interviews with selected persons representative of the actors involved.

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THE ACTORS

In the consideration, adoption and administration of a TDR ordinance in a New York town, the following would be among the actors:

- the original owners of the rights made transferrable by the legislation;

- eligible and thus prospective purchasers in reception districts;
- owners of land in the immediate vicinity of reception districts;
- the zoning board of appeals;
- the courts to which the zoning might be appealed;
- environmentalists and others seeking to further their interests through land use controls.
- the land use planners involved in preparing the plan;
- the planning board;
- the zoning administrator;
- the municipal legislative body;
- the tax assessor;
- the land record office; and,
- attorneys engaged in title work and title companies.

Let us now attempt to 'walk through' the relationship of TDR with each of the actors, looking at the application of TDR insofar as possible through their eyes. To provide an environment for the application, we will assume that a Town is zoned with much of its area in a 'half-acre' residential district. It has recently been informed that an undeveloped part of such district overlies an aquifer which needs to be protected against development. The solution recommended by consultants is to amend the zoning ordinance by adding a TDR section and to amend the zoning map with a TDR overlay which would place the aquifer in a preservation district and designate other, suitable land in the Town as reception districts into which the rights from the aquifer area might be transferred. Tentative areas have been mapped but final designations require more exhaustive study than has been possible with available funds. We will start with consideration of the owners of the land over the aquifer who would be the original owners of the transferable development rights were the recommendations put into practice.

The Original Owners

The owners of land being considered for, and later located within, a preservation district are likely to see themselves as being over-severely and unfairly limited in the exercise of their rights. At least some of them can be expected to have immediate or longer range interests

in developing their lands, or selling them to others for development in accordance with previously existing zoning. Interruption of those plans is likely to be seen, at least by some owners, as intolerable--even if some new device for possibly emerging financially whole through sale of such rights is provided.

Landowners faced with the prospect of intolerable limits on the utilization of their land have two principal recourses: the political and the legal. Taking the political route, they can attempt individually or collectively to defeat or amend into tolerable limits any land use control measure which they consider unduly onerous. Quite often in American zoning history, landowners have been successful in such activity. Taking the judicial route, which generally follows upon lack of success in the political, they can try to convince a board of appeals of undue hardship or a court that their land has in effect been taken without just compensation, that the ordinance is capricious and arbitrary, that it does not provide equal protection, that they are experiencing hardship unnecessarily or other device.

Underlying the working TDR hypothesis is an assumption that the restricted owners will not be intractable or will not be successful in their intractability, since they will have not only the right to sell their development rights but there will also be an adequately robust market place. For each owner to emerge from the restriction relatively whole, he must be able to sell his development rights for a net return which, combined with his perceived value of his residual rights, will be at least approximately equal to if not greater than the value to him of his land prior to TDR. In estimating his net return, he must consider any increases on real estate taxes paid due to the legal separability of the development rights while they are being held prior to sale, his income tax position and any other expenses, or 'hassle' involved.

The robust market that is essential would probably require competition among several buyers--certainly not dependence on one buyer in a monopoly position. It also would mean, as we shall see later, that the rights as far as the buyer is concerned should be freely usable

without any further required tests. An environmental impact screen or any other cloud on development rights' usability would undoubtedly depress the market. Because of vagaries in the private market, some writers have suggested that a municipal fund should be established for the interim purchase of development rights (which, hopefully, could later be sold to owners in the reception districts). Although the establishment of a public TDR bank might reduce any anxiety of the original TDR owners relative to prospects for successful sale, it would introduce problems for the municipality in the new and unaccustomed role of dealer in development rights and might result in permanent public possession.³

Not all original owners would be similarly affected by TDR as can be seen by considering only one variable: the preTDR opportunity to develop the land. Let us consider owners in three different situations.

Owner A. Land is favorably situated for early development under current zoning:

Will profit from TDR only in so far as can sell development rights for a net return which, with the residual value of the land, would be greater than he could get from early development (or sale of land to a developer).

Owner B. Land is favorably situated for later development only:

Will profit from TDR only in so far as can sell development rights for a net return which, with the residual value of the land, would be greater than the discounted value of future development (or return from sale of land to a developer).

Owner C. Land is not favorably situated for development now or in the future:

Will profit from TDR in so far as there is any net return from sale of development rights.

It can be readily seen that the better the prospects for early development of land under existing zoning the less would be the potential profit to the original owners, and, conversely, that persons with little or no prospects of selling land for development under current zoning would have the most to gain from area-based TDR. This may be the reverse effect from that needed to secure support of the legislation.

Some suggested TDR legislation has provided that the number of transferrable development rights be based on the current value of the

rights rather than the area of land. This would require an appraisal of the value of development rights associated with each property in a preservation district and the conversion of this value into standard transferrable development units, necessitating a valuation process more akin to land appraisal for public purchase than the normal tax assessment operation. The expense of appraisers fees, ensuing court cases and handling the complaints inherent in such a process would probably go far toward offsetting the value of TDR.

An additional problem which appears possible for the original owners is the potential for swindling unsophisticated owners out of their development rights by fast-talk artists. The history of mineral rights is replete with examples of people selling for a song rights which they did not fully comprehend.

We can conclude that not all landowners in preservation areas are going to be satisfied with the potential pay-off from TDR. We can also conclude that, considering the history of zoning, all available political, administrative, and judicial channels will be explored in trying to block or to set aside the proposed TDR legislation.

Let us now look at the potential buyers of development rights.

The Eligible Purchasers in Reception Areas

For reasons relating to land records, assessment and planning purposes, development rights can only be transferred under the TDR concept when they are to be repackaged with land; they cannot be free floating. A suitable district or districts must be created into which the rights may be transferred in order to assure the market necessary for TDR operation. These reception districts must be capable of absorbing readily all of the development rights which owners in a preservation district might wish to sell. As we shall see by looking at the position of the landowners in recipient districts, this is a more complicated problem than merely assuring that there are the right number of adequate acres in recipient districts.

The owner of land in a recipient area, unless he has participated in the establishment of TDR in his municipality, is something of an innocent bystander who suddenly finds himself involved in someone else's

business. The principle purpose of the ordinance has not been to limit or to assist him, but to accomplish purposes in a removed preservation area. Most TDR writings have tended to assume that such owners would welcome TDR because of the opportunity presented to profit economically by developing at higher densities. However, not all the owners in the recipient areas are likely to share a common situation with respect to their interest in and ability to profit from the purchase of development rights, and individual landowners may change their positions over time. Landowners can be expected to resist being placed in a recipient district unless the perceived benefits exceed the perceived costs.

Some owners may be farmers who want to continue farming for an extended period while others may be immediately interested in selling-off to a developer. Some may be city people who hold their land for recreation purposes and who want to keep the area rural. Some may have objections to land in the area being developed at higher densities than permitted by the old zoning since higher densities may require infrastructure installation with associated taxation, less expensive houses and, thus, a different type of people; or, just more people with children who will require schools and may raid one's apple trees or shoot arrows at one's cows. Others may be land speculators or developers happy at all the intensity they can get. There may or may not also be speculators and/or developers waiting in the wings to purchase land at a favorable moment.

Some of these owners may object strongly to being placed in a recipient district and utilize every means available to defeat TDR or to keep the land in the area of their holdings from being mapped as a recipient area. If a district is established, some will not want to purchase development rights, or to do so only at a later date, and others may not be able to take advantage of such rights because of peculiar conditions of their land tenure or of their land--such as problems relating to installation of infrastructure. Some may not want to develop themselves and may not wish to see their neighbors permitted and encouraged to develop at higher densities because of greater costs and problems they see in having development in their vicinity. Still others may be

supporting energetically and perhaps effectively the location of their properties in a recipient area, whether or not it has been recommended by the planners.

This diversity may lead to a number of problems. The first of these is that there may be a great deal of political controversy over the establishment of reception districts and the inclusion or exclusion of particular land holdings. The more numerous and diverse the owners in a district, the greater the possibility of conflict.

The second is that the recipient areas may have to be many times larger than the preservation areas in order to provide a robust market for all owners in the preservation areas who wish to sell, especially since the original owners will most likely have property tax advantages from early sale.

Third, the enlargement of the recipient area to a point where only a fraction of the land may ultimately be developed at the higher intensity creates problems in addition to bringing a greater number and diversity of owners. It requires the planner to locate and include in recipient districts much more suitable land than can be developed at the higher density and to consider the political, legal, and developmental implications of such enlargement. It probably would also require the installation of larger-sized water and sewer lines and other development infrastructure over the recipient area, as many different patterns of intensity of development could occur. It would also create a problem of unequal treatment for the owner who would face the costs of higher density development of neighboring property but be unable himself to buy development rights. In the example we have used, he might have to pay special district taxes for water and sewer so that any land in the recipient area would be able to be developed on quarter-acre rather than half-acre lots; would see his neighbors develop on quarter-acre lots; and would still be unable himself to purchase rights because he came late to the market. Even more to his misfortune, the circumstances of the area might then make economic development on half-acre lots infeasible. Such a person might well seek and receive redress from a board of appeals or court, with serious repercussions for the

particular TDR application and TDR in general.

Fourth, in the controversy over TDR in the reception area, the question of the reasonableness of the original zoning is certain to come up. If it can be reasonably argued that the intensity of zoning permitted can be greatly increased without harmful effect to the community (and with only superficial relationship to the lowering of land use intensity in another, and perhaps distant part, of the municipality) is not the original zoning too restrictive? 'Why should I,' an owner might ask his friend on the Town Board, or his attorney, 'be required to pay for developing at a quarter-acre density when there is no apparent public purpose relating to my part of town in restricting my property to half-acre density?'

Fifth, the market may not be favorable at any given time for the development of land, with or without the addition of development rights. Any purchaser, even at a supposedly favorable moment, might later find himself with development rights on which he must pay property taxes, but which he could neither use nor dispose of on the market.

Sixth, even though a potential purchaser and developer in a reception district might want to utilize development rights, he might not at a given point in time have access to necessary infrastructure at reasonable cost and might not be able to forecast when he could obtain necessary conditions for development.

Seventh, it is not inconceivable that the zoning could be changed, through the legislative body or the courts, to permit a neighbor to develop, as a matter of right, at the same density for which he has paid dearly.

Eighth, the TDR ordinance might be invalidated in whole or in part, leaving him with legal tangles to straighten.

Ninth, as previously mentioned, he might run into environmental impact statement requirements or other tests which would delay or even prevent his development of the land.

Tenth, purchasers of development rights would also probably insist on the right of resale to other eligible purchasers in order to reduce their risks. This could lead to speculation in development rights which

might or might not be desirable.

It can be seen from this effort to consider the prospective purchaser that there is considerably more to the setting up of a market for development rights than the designation of technically suitable districts. If there are not sufficient willing and able purchasers to establish a robust market, few if any development rights can be transferred and political and judicial support for TDR will be questionable. The political problems, moreover, can be expected to increase with the size of the district, which conflicts with the desirability of large districts for market purposes. It may well be that actions necessary to the establishment of a robust market for development rights will create secondary effects which are more disadvantageous to the municipality than the advantages gained in the preservation area.

Owners of Land in the Immediate Vicinity of Reception Districts

A landowner in a reception area who does not want to develop his property, as pointed out in the previous section, may suffer disbenefits from the development of neighboring properties at higher densities or at an earlier time than would have normally taken place. He does, however, at least have the opportunity himself to develop if he desires, can find development rights to purchase, and is otherwise favorably situated. The owner of property adjacent to a reception district may suffer the same kinds of disbenefits without enjoyment of the possibility of development. Very probably, his interests, unless of course his land were zoned for commercial development, would be hurt by application of TDR. Like other owners suspecting their interests might suffer, he could well be expected to oppose politically the concept.

The owners of lots in previously subdivided tracts would probably also oppose development of nearby land at greater densities. Owners of acre-lots have traditionally opposed the down-zoning of similarly zoned land to half-acre, half-acre to a quarter, *etc.*, so that the individual lot owner would probably be as opposed to the change as a farmer who is adversely affected.

The Zoning Board of Appeals

Zoning Boards of Appeal have traditionally been a problem to land use planners; they frequently undo those objectives which the planners have sought to further through zoning by the unwarranted granting of variances. All too frequently, variances granted by appeals boards are such as predictably to be reversed if appealed to court, but they are not appealed because of the cost to interested private parties and/or the seemingly inappropriateness of one arm of a municipal government suing another. Considering the past behavior of many boards of appeal, it would not be unthinkable for an owner in a preservation district, unable to find a suitable market for his development rights and unable to pay increased taxes resulting from their being split from his property, to seek and receive a variance to permit development proscribed under a TDR ordinance.

Again, a landowner in a reception area caught between two properties which had developed at increased densities through TDR an unable either to purchase development rights himself or successfully to develop at the normal density for the area, might seek and receive a variance from a sympathetic appeals board. Either of these instances would be contrary to the intent of TDR and would weaken the viability of the application.

The Courts

The assumption that courts will accept the ability to sell one's development rights as adequate substitute for the ability to utilize one's development rights is basic to the TDR concept. If the courts, and no one can predict how they will eventually decide the predictable judicial challenges, find this is not an adequate substitute, or is not an adequate substitute in the absence of a robust market, all or particular applications of TDR may be determined to be unconstitutional. If such a decision were made early in the application of a TDR ordinance, all that would be lost is the time and resources applied in its introduction. If, however, considerable private and public activity had occurred with respect to TDR before it were tested and found wanting, con-

siderable loss and confusion could result.

Nor is the due process clause the only constitutional issue on which TDR might be challenged. Cases could presumably be made under the equal treatment provision where application can be shown to have markedly different effects upon neighboring properties.

Aside from constitutional issues, there are certain to be many judicable issues relating to the reasonableness of particular ordinances as they affect different owners. It would seem to be wise, considering such issues, for due deliberation and small-scale experimentation in the adoption of TDR. Securing of favorable results in test cases would appear to be a desirable precursor to wide-scale utilization.

Environmentalists and Other Interest Groups

Although this section deals with the concern of those interested in preserving the natural environment, it is generally applicable also to those who would preserve historic buildings, buildings of particular architectural merit, and prime agricultural land and others with similar concerns. Much of the interest in and impetus for TDR has originated with conservationists and preservationists in and out of government who have perceived a public need for severely limiting or prohibiting certain development which might otherwise occur and which might be inimical to a public purpose in preservation. These groups, not without reason, have concluded that conventional zoning is inadequate for their purposes because of limitations of zoning powers stemming from the constitutional protection of property rights, referred to commonly as 'due process,' 'just compensation,' or the 'taking issue.' Public regulation which deprives an owner of reasonable use of his property has generally been interpreted by American courts as conflicting with the Fifth Amendment of the U.S. Constitution which provides:

. . . nor shall private property be taken for public use without just compensation.

The primary appeal of TDR to environmentalists and other preservationists apparently lies in its perceived potential for avoiding the taking issue in any severe public restriction on the rights to use land.

A number of inadequately foreseen problems could well be raised for such interest groups in the widespread application of TDR. The first is that it would not be possible to ascertain for a considerable period what stance the courts in the various states, and eventually the United State Supreme Court, would take on the issue of whether, and under what conditions, TDR successfully bypasses the taking issue. Adverse court reaction could render ineffective the work involved in securing adoption of TDR legislation. The possibility of adverse court reaction would also tend to inhibit the private transactions of land among owners who might have their plans disrupted by adverse court decisions and thus result in little activity under adopted ordinances.

The second, and apparently contradicting issue, relates to a perceived recent tendency of state and lower courts to uphold public regulation which approached taking when the purpose was seen by the courts as a necessary public protection, the regulation was well drafted and the evidence clear and convincing. Bosselman, *et al.*, in *The Taking Issue* conclude that ' . . . the fear of the taking issue is stronger than the taking clause itself.'⁴ Following the TDR route would create difficulties for previous and future efforts at severely limiting development without compensation or the problems of TDR. Consider, for example, a municipality which has previously stopped development successfully in a flood plain or an estuarian area and now seeks to introduce TDR in its efforts to preserve an aquifer. Those previously denied development possibilities without receiving transferrable development rights could well complain, politically and to the courts, of unequal treatment. On the other hand, the *post facto* granting of development rights transfer privileges to those aggrieved might be practically or politically impossible. In a more general sense, the widespread development of TDR utilization would undoubtedly inhibit efforts at reasonable application of restrictive development legislation without the complications of TDR.

A third problem area relates to environmental concerns in reception areas. In their concerns with protecting environment in the critical areas to be designated as preservation districts, environmentalists have generally given inadequate attention to possible adverse environ-

mental impacts in reception districts, apparently assuming that planners could avoid such concerns in the designation of reception districts. This assumption, in turn, rests on an assumption that there would be sufficient area in the municipality to provide an adequate market for DRs in which permitted densities could be increased substantially without environmental problems, and where increasing the density of development would be politically acceptable. It is probably true, other things being equal, that the severity of environmental impact increases with intensity of use. It is certain that in many areas the densities permitted under existing zoning already reach or exceed an environmentally desirable level. To reduce the existing density restrictions in such areas in order that some owners might develop additional dwelling units would not be desirable. It would be hoped that each transfer of density would be accompanied by an environmental approval process, but it has been demonstrated elsewhere in this paper that placing any conditions on the free use of transferred rights would inhibit the market.

If the TDR innovation proves workable, then, it may well be a mixed blessing to environmental interests, tending to halt progress on efforts to limit development without compensation and creating environmental problems in reception areas. Efforts to reduce the incompatibility problem in reception districts, however, are likely to affect the robustness of the market for development rights, and thus to affect the acceptance and utilization of the concept.

The Land Use Planners

In addition to generally sharing environmental concerns covered elsewhere in this paper, land use planners are concerned with issues such as the general efficiency and attractiveness of the physical development of the community; the finding of appropriate and harmoniously related sites for various types and intensities of land use to existing and planned public utilities, transportation and community facilities, economic and financial concerns of the municipality; and, the social implications of land use arrangements. They are interested as well in achieving legally supportable and politically acceptable land use arrangements that can be achieved through zoning and other available measures.

To planners, the hypothesized ability cheaply to achieve greater limitations on development through TDR is of considerable interest. Planners must also be concerned, however, with the political feasibility and economic practicability of the concept and with the possible effects of the accompanying intensification of use in the reception districts.

The application of TDR may place extraordinarily difficult demands upon the planner. We have seen that the political and judicial acceptance of TDR may hinge on the ability of the regulations, in each application, to achieve an adequate balance between the supply of development rights of which the original owners must dispose (to avoid taxation) and the demand for such rights from landowners (acting on their own behalf or on behalf of prospective purchasers of packaged land and rights) in reception districts. Since the market for development rights is determined by a large number of factors which may change rapidly, no one of which can be predicted with absolute accuracy, the ability to predict market conditions for development rights with any degree of confidence would be very limited. The planners could compensate to a degree for this by designating relatively large areas as reception districts, but this would create other problems.

The planners must, of course, be concerned not only with the adequate selection of the preservation districts, but also with the effects of possible increases in intensity of land use under any possible arrangement of development rights' purchase and application in the reception districts. (Insofar as arrangements are limited, the market is interfered with). Whereas a relatively large reception district area would be desirable from the standpoint of the development rights market, the larger the district, the greater the planner's difficulty in providing for any possible pattern of land use intensification. Plans for and installations of utilities, storm drainage and streets, would have to be adaptable to any pattern of development possible with TDR transfer. The larger the reception area relative to the space needed for potentially transferred rights, the smaller the proportion of owners who might profit from purchase of rights and the greater the number of owners who might suffer negative effects from being included in or located adjacent

to the district. It follows that the greater the number of potentially harmed owners, the greater the probability of political and legal challenge.

The planners must also keep in mind the possibility of the municipal legislative body interfering with their carefully constructed plans in the course of enacting ordinances (e.g. removing part of the preservation area or reducing or adding to the reception districts). Also to be considered is the potential for Boards of Appeal disturbing the logic of the plan.

As an additional problem, planners should be concerned as to whether introduction of TDR legislation would undo the progress that has been made in securing severe limitations on development without compensation.

Planners might also be concerned about the effects of transferrable development rights on future land use decisions, especially since TDR would undoubtedly be applied in many areas where the zoning is already too permissive from environmental or other standpoints. In the New York town example used herein, the planners might want to upgrade the zoning from one half-acre per dwelling to one-, two-, or more acres per dwelling and find public support for such change at a new stage of town consciousness. Such reduction of district densities could hardly be imposed, however, if some owners had already purchased development rights putting together a development package that the zoning change rendered unfeasible. Similarly, an increase of density in an area where some of the land had previously been developed at or near the higher densities through the purchase of development rights, would not be seen as fair by those who had responded to public encouragement to purchase their extra units.

In summary, the introduction of TDR legislation can be seen as placing difficult-to-impossible responsibilities on the planner as well as potentially affecting previous progress in severely restricting development without compensation. It would also greatly complicate any future efforts at raising or lowering permitted intensity of use.

The Planning Board (or other subdivision approval agency)

In addition to partaking of the problems of the planners in dealing

with TDRs, the Planning Board shares other problems relating to its subdivision approval functions and functions in approving multifamily development where this has been assigned. The application of residential TDR legislation will take the form of permitting in the reception areas either increased numbers of units in multifamily developments or smaller lots in conventional subdivisions. In the first instance, control would be by the zoning administrator, although planning board approval might also be required, in the latter, by the planning board. In approving a subdivision with transferred DRs, the planning board would have to require not just proof of ownership of the added development rights but the actual filing of the certificates representing DR ownership as these would have to be permanently attached to the subdivision plans to prevent possible reuse. In case an approved subdivision were not developed and approval lapsed, however, the rights might have to be returned to the developer. In most cases such applications of these operations should represent no particular problems for the planning boards except where the increased density would create development problems which had not been foreseen in the ordinance. In any instance, where the planning board found it necessary to disapprove a subdivision (or a plan for multifamily development) because of problems relating to the increased density permitted by development rights transfer, severe problems might result for the developer who had purchased rights in expectation of ready usability. A few such cases would soon depress the market for development rights.

A planning board which had supported introduction of TDR might well find itself in an awkward situation dealing with the resultant expectations and mechanics.

The Municipal Legislature

Writers on TDR have tended to neglect the necessity for TDR, like other legislation related to land use, to be adopted by the municipal legislative body. This requirement has implications that the resultant legislation may be something different from the calculated, well balanced plan the planners and environmentalists have pictured in much of the literature.

Like traditional zoning, TDR is certain to have distributive effects, leaving some better off and some worse off. Whereas some effects will only emerge with experience, others are predictable. Since TDR would probably stimulate development by facilitating and encouraging immediate utilization of development rights which otherwise might be slow in coming on the market, antigrowth factions could well oppose its introduction whereas those who would profit from stimulated development would support it. Some landowners in or near the reception districts might tend to oppose TDR legislation while others would profit from improved development opportunities. Environmentalists primarily concerned with the preservation purposes might endorse and others more concerned with the reception areas might oppose. People in and near the reception areas might well demand the right to develop at the higher densities permitted under TDR only to those who purchase development rights, whereas those who have purchased rights would fight to preserve their investment.

These and other differences will be expressed politically in efforts to prepare, shape, adopt, vary, and amend or repeal TDR ordinances. Some land owners are certain to use every political device available to seek to be added to or removed from preservation or reception districts as their perceived interests dictate, both before and after the adoption of the ordinance.

Out of the pulling and hauling of the legislature by the various interests, the TDR legislation may emerge far different than envisaged in the TDR literature. The most carefully prepared plans, if they survive at all, may emerge so changed as to be unsupportable by their original developers. While this is a problem with all zoning, the value of TDR is perhaps more dependent on its technical adequacy than is traditional zoning.

The Zoning Administrator

The municipal zoning administrator, under current administrative practices, is responsible for granting zoning clearance for buildings, sometimes pursuant to subdivision approval by the planning board and special permit by the board of appeals, planning board or other designated authority. Some zoning administrators are full-time professionals

with appropriate training and experience while others are part-time appointees with few qualifications or little aptitude for the position. Some have excellent files and full-time file clerks but others do not. At least one, to the knowledge of the writer, keeps his records in a shoe box on top of his kitchen refrigerator. The zoning administrators, whatever their backgrounds and current practices, should have little difficulty in administration of the preservation districts although the history of administrative error would indicate a fair possibility of the occasional erroneous grant of a zoning permit in such areas. A more difficult problem may exist for the less systematic official in the reception districts, especially when multifamily dwellings are involved. Developers of such units would have the right to the number of units permitted in the district plus the number of units legally purchased and assignable to the land parcel in question. The zoning administrator, in such instances, would have the added responsibility of seeing that no more than the legally permitted units are added, that proper deed for the purchased units is submitted and that the transaction has been recorded. In addition, the deed or other paper indicating TDR ordinance must be properly handled so that it cannot be utilized again, but yet can be retrieved and returned to the owner if, for example, the building were accidentally destroyed by fire. The possibility that the owner of a destroyed apartment might not rebuild at the extra density and decided to transfer his DRs to a different holding in a reception district must also be considered.

Hopefully, TDR would not be applied in areas without able zoning administrators, but there may be no way through general legislation that adequate administration can be guaranteed.

The Assessor

Certain additional responsibilities will be added to the duties of the municipal tax assessor by the introduction of TDR. The location of transferrable rights would have to be maintained in his books; the value of transferred rights would have to be calculated; and, the residual value of land from which rights had been divested recalculated. According to James Demint, the Assessor for the New York State Town of

Manlius, this would present a little more work but no great difficulty for towns, like his own, where tax records are computerized. He indicated however, that the application of TDR to any considerable amount of property might cause significant additional work for the assessor in the large majority of New York towns in which records are not computerized. If however, the number of transferrable development rights were related to the assessed value of property, as some writings here suggested, the assessors might find themselves in the very difficult situation of deciding the compensation each landowner would obtain from selling development rights.

The Land Records Office

Protection of the public and the administration of governmental functions of tax assessment and land use and building regulation would require that record of development rights transfer be entered in the land records office. For the seller, this would be similar to the filing of notice of the sale of an easement or timber or mineral rights. The attachment of purchased rights to a property would be a new procedure, but would probably be similar to the removal action, according to James Gorham, County Clerk of Onondaga County, N.Y. ⁵ He indicated that TDR legislation would not only require this filing but should also direct the land records office to so handle it. No particular difficulty was foreseen in handling such filings, however, other than the extra work involved.

Attorneys Engaged in Title Search and Title Guarantee Companies.

Attorneys search titles in order to provide owners, prospective purchasers, prospective mortgagors and other clients with greater assurance as to the ownership of property and of the rights attached to it. They must search carefully for any limitation or alienation of property rights. Title guarantee companies seek to provide a higher level of assurance through a guarantee of title and have a direct financial as well as ethical involvement in the accuracy of their findings with respect to rights in property. Both would be extremely concerned that any measure introducing TDR be adequately handled with respect to land records, a matter which has received less than adequate attention in the TDR literature.

John C. McGuire, Executive Vice President of the Monroe Abstract and Title Company, when interviewed about TDR, indicated concern with a number of possible problems. He saw a need for clarification as to whether TDR was a police power extension of zoning or whether it consisted of a 'glorification of zoning into a valid covenant running with the land', indicating something of the semantic difficulty involved in extending zoning into the area of transferrable land rights. He had some thought that the limitations on land use in reservation areas, as proposed under TDR, might be so much a change from traditional zoning as to require the immediate entry by the adopting municipality into the land records of each property affected. He indicated that this would be desirable if not vital in title search and guarantee work. He was of the opinion, moreover, that in New York this might require separate action against each property. Since deeds are indexed by owner, except in a few counties where they are also locatable by a land parcel index, considerable work might be involved in locating the correct chain of title entering therein the use restrictions. He indicated any state enabling legislation for TDR should also be carefully worded to require the filing of any transfer of development rights in the chain of title of both the seller and purchaser. McGuire also expressed some questions as to whether titles could be guaranteed as to the usability of transferred development rights until such time as judicial approval had been secured for the practice.

There seems to be some question as to whether TDR might complicate the problem of assurance of good title, especially if the enabling legislation were not skillfully handled with respect thereto. It is evident that those involved in title examination should be carefully consulted in the further development of legislation, both to see that any title problems are adequately handled and to assure the understanding and support of those involved. It appears at least possible that the suggestions that the application of TDR be recorded in each affected title, if found to be necessary on further reflection, would make application of TDR considerably more difficult for a municipality.⁶

CONCLUSIONS

This critical, speculative exploration into the future of TDR application has raised questions which should give pause to planners, environmentalists and others who have been advocating widespread utilization of TDR. The cartoon cover of the magazine *Planning* of the American Society of Planning Officials (ASPO) in July of 1974, pictured TDR as the miracle of the loaves and fishes; it may well have been right in implying, as we interpreted it, that without divine assistance, there is no such thing as a free lunch. TDR attempts to get something for the public with little or no cost to anyone. It differs from efforts to stop uses without any compensation in that there are frank political costs in the former which TDR seeks to avoid.

It has yet to be demonstrated that the concept would receive judicial sanction and indeed it seems probable that in at least some instances it would not, leaving possibly severe legal triangles in its wake.

It is not clear that TDR would work as predicted in large scale operation, even if it should be approved by the courts. Establishment of an ever-robust market for the transfer of development rights is a requirement for its adequate application, and robustness appears to be difficult-to-impossible to maintain in most situations. Without a robust market, just compensation appears impossible. (On the other hand, if one talks about the public purchase of development rights, one is talking of eminent domain a different concept from TDR.)

Far too little attention has been given by the proponents of the concept to the problems of the reception districts and of the differential effects of TDR on differently situated owners in such areas. It is also apparent that the literature generally tends to picture TDR adoption and administration as somehow exempt from the vagaries of politics, imperfect planning, and the board of appeals. Considerably more realism is needed in considering the pragmatics of application.

It appears to this writer that there are two courses of action which would be preferable to the pursuit of general enabling legislation permitting any and all municipalities to adopt TDR legislation. One would be to drop the entire idea until it has been further studied, except perhaps to permit the extension of the cluster zoning concept to adjacent properties under different ownerships or to properties separated only by a street.

The second would be to foster limited and closely observed experimentation with TDR in a few well managed municipalities under special legislation in a frankly experimental program. Certainly, a go-slow rather than an Admiral Dewey approach appears warranted.

NOTES

¹Audrey Moore, 'Transferrable Development Rights: An Idea Whose Time Has Come,' in Jerome G. Rose, ed., *Transfer of Development Rights*, 1975.

²Frank Schnidman, 'Transfer of Development Rights, Questions and Bibliography,' *Urban Land*, January 1975, pp. 10-14.

³State of New Jersey, Legislative Assembly Bill No. 1118 (1976); Art. IV, paragraph 26.

⁴Fred Bosselman, *et al.*, *The Taking Issue*. Washington, D.C.: U.S. GPO, 1973. P. 313; *cf.* also ch. 11.

⁵Interview with Gorham.

⁶Interview and subsequent correspondence with McGuire.

POSSIBLE LEGISLATION FOR
TRANSFER OF DEVELOPMENT RIGHTS

The subject of control of the use of land is an important one today. Land, more than any other element of the environment, can determine the quality of that environment depending upon how it is used. The pattern of land use is constantly being determined. In New York, the hundreds of day-to-day decisions made by city, town, and village planning and zoning boards determine, when added together, the way in which land will be used and where people may reside, work, and play.

Despite the fact that there have been some losses in population recently, in the New York metropolitan region, the future will probably bring increased growth in suburban areas. Boris Pushkarev, a leading American scholar in urban affairs, has gathered statistics on the matter:

Even the latest, scaled-down projections of the U.S. Census indicate that the country is likely to add 46 million persons to its population between 1970 and 2000. If 70 percent of this growth occurs in the suburban portions of metropolitan areas, as it has recently, then it would be an absolute rise in the suburban population equal to 93 percent of that which occurred from 1950 to 1970--the period of greatest suburbanization in the nation's history. Clearly, the fact that we are on the path to eventual zero population growth is no reason for complacency with regard to land-use questions in the immediate future. [Boris Pushkarev, 'Book Review: *The Costs of Sprawl*,' *Ecology Law Quarterly*. 5 (1970) : 190.]

It is in the suburbs where the important decisions on land use will be made. The suburbs have a number of concerns about development. Some areas have no small amount of apprehension when they consider present and expected growth because of the costs associated with the services that must be provided.

A TDR BILL

This chapter presents a possible method for transfer of development rights, a tool potentially useful in guiding land development. The first chapter indicated that various TDR plans have been conceptualized and that some have even been adopted, though few have been used. In this chapter, TDR is seen as an implement for preserving from urban development lands that have a resource use; these uses include agriculture production, timbering, mining, or ecological uses such as watershed lands or scenic areas. In addition, TDR was designed to fit the legal traditions and local government system of New York State.

The logical vehicle for carrying the concepts of a TDR system is a draft of legislation. That is the form this chapter takes. TDR, as it might be proposed for New York, is presented by means of the format of state enabling legislation. Presentation of the TDR system in legislative form does not necessarily imply that the researchers endorse the adoption of TDR, and it does not imply that the researchers would encourage the passage of this bill in the New York State Legislature.

Enabling legislation is different from a local ordinance. It is general and describes procedures where a town or village ordinance would specify the details of operation. State enabling legislation also provides specific authority to municipalities and the standards of operation they are required to meet. The authors combined the requisite of TDR with progressive concepts in planning and administration to produce the draft statute. This chapter presents the draft bill interspersed with explanations of its various sections.

This draft bill has been submitted to land use researchers and government officials--both state and local--for comment. Several critical responses were received, and the draft has been subsequently revised. The draft was also submitted to a consulting attorney for comment and format revisions. All these changes were incorporated into a final draft of the bill. That final draft is the last chapter of the report:

'Transfer of Development Rights--A System for New York State.'

Aside from the modifications in format, the following changes in the draft found in this chapter were made to write the final draft found in the next chapter:

(1) the requirement of a 25-acre minimum size for passive land use districts was eliminated; and,

(2) the requirement that active and passive land use districts be contiguous was eliminated.

AN ACT

to provide in New York state for the enactment of guidelines governing the use of development rights and their transfer from and to specified districts and providing for the establishment and utilization of these land use districts, constituting amendments to the general municipal law, the real property law and the real property tax law.

The act belongs as an amendment to the General Municipal Law, because it deals with land use control--traditionally a municipal function. Aspects of TDR require clarification of the Real Property Law and the Real Property Tax Law; however, these are minor modifications.

The bill is designed to address or to try to correct specific conditions of land use as they are found in New York. The bill is responding to the loss of open space for parks and scenic areas; it is responding to the loss of farmland caused by urban and suburban development:

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1: Legislative findings and declarations of purpose: It is hereby found and declared that: The land of the State of New York is the basic resource upon which the state's people depend for their health and livelihoods.

The competition for use of the state's land resources is intense and conflicting especially in the metropolitan areas.

Utilization of the land resource must be accommodated to serve the economic interests and well being of the people of New York state, yet the integrity of the resources must not be compromised because future generations of New York citizens will depend upon this same land.

It is recognized that the land contains several and diverse resources. Some of these are intrinsic, for example the land's capacity to grow agricultural crops and timber for

harvest and use, the mineral wealth held by the land, the watershed properties, the scenic attraction of land areas because of their natural features. Other resources have been attached to the land by cultural norms and social institutions. An example is the resource of locus; that is, some land is desirable for use as sites of society's industrial, commercial, institutional, residential and other needs.

It is known that the use of land's intrinsic resources often conflict with land's attached resources, yet both are essential for a functioning social system.

In response to the stated conflict and stated need, this act empowers local governments to separate rationally the use of the intrinsic resources from those attached resources.

One of the basic reasons for the bill is to permit the separation of the *commodity value of land*--such as its value if subdivided--from the *resource value of land*--such as agricultural use or preservation of historic sites. This separation is the basis for TDR. A real property owner is permitted to sell his commodity value to another landowner if he is prevented from utilizing it himself.

DEFINITIONS

All aspects of the new land use control system, TDR, have to be defined:

§2. The general municipal law is hereby amended by adding thereto a new article, to be article twelve-G, to read as follows:

ARTICLE 12-G

ACTIVE AND PASSIVE LAND USE DISTRICTS

Section 239-z. Definitions.

1. *Development rights.* The term "development rights," as used in this article, includes the right to use real property for subdivision, construction, use and occupancy of any structure thereon, including industrial, commercial, institutional or residential purposes; provided, however, that this shall not include timber, mineral, agricultural or ecological uses and any structures necessarily related thereto.

The most important definition is that of *development right*. The preceding definition explains that development rights are the commodity value of land.

Transfers of development rights cannot, obviously, take place anywhere. Careful planning on the part of the local government is required to determine where the transfers may take place--and are necessary--and where they may not.

First, a general area must be mapped where the community wishes to concentrate development into certain subareas and to preserve resource lands in the other subareas. This bill calls these general areas *integrated districts*:

2. *Integrated District.* The legislature of the state of New York or a governmental subdivision thereof, by its governing body, may establish a geographical area to be designated an "integrated district." Such integrated district shall be a contiguous section of real property bounded and described as determined by the establishing authority. In the event that such integrated district extends across the boundaries of more than one governmental subdivision, such district shall only be established by cooperative effort of the governmental subdivisions as hereinafter provided.

Such integrated district shall include designation as active land use or passive land use subdistricts. The entire district must be so designated.

It is within the integrated district that transfers are done. Within the integrated district, other districts are drawn. The areas into which development rights might be transferred are called *active land use districts*:

3. *Active land use districts.* A designated land area within an integrated district wherein development rights may be exercised subject to existing zoning controls.

Also within the integrated district is the area from which transfers take place. These areas complement the active land use districts, and they are called *passive land use districts*.

4. *Passive land use districts. A designated land area within an integrated district in which development rights may not be exercised except as hereinafter provided.*

There are purposes for establishing integrated districts that complement those whose basis is environmental protection. Whenever development is disallowed in one area with TDR, it is encouraged in another. Therefore, TDR can be used as a tool of planners to design more compact settlements. This does not necessarily mean highrise apartments. It does mean that land may be used more intensively than the single dwelling on each one or two acres. It could mean single-family dwellings on a quarter of an acre instead. It could mean ten or fifteen townhouses on an acre.

The bill lists the purposes for TDR:

§239-aa. *Purposes. The purposes for which the state of New York or a governmental subdivision thereof may act to establish integrated districts are:*

1. *to establish areas for development that will provide a population density adequate to support governmental services including but not limited to sewers, water, transportation and utilities;*
2. *to provide a pattern of human settlement that will conserve essential resources of the land and energy;*
3. *to provide control over development of areas including but not limited to agricultural, mineral and timber lands; areas with rare, unusual or unique geologic formations or biotic communities; and archaeological and historic sites.*
4. *to conserve open spaces and land for parks as areas necessary for the health, welfare, recreation and enjoyment of the people of the state of New York and the well being of the state's communities.*

5. to provide for planned control of land use and development wherein a community may foster provision of private services such as industrial, commercial, and residential development and wherein the governmental subdivision may provide public services and facilities necessary for the health, safety, and welfare of all members of the community.

The Districts

The integrated district must basically be an area that has some coherence. It could be environmental coherence, such as a drainage basin; it could be social coherence, such as an historic area; it could be political coherence, such as a school district. Regardless of the definition, the integrated district must be composed of contiguous land.

§239-bb. Uses of Districts.

1. In establishing an integrated district, consideration shall be given to the relationships among natural resources, the social, political and economic organizations which exist within the boundaries of the integrated district.

When the unit or units of government shall establish such districts, the development rights of the land within those districts shall be considered separate from the other rights of land ownership. Ownership of the development rights shall remain with owners of record at the time the integrated district is created until such time as the owner may dispose of it. The purposes for which such districts are established shall be specified in detail in the resolution the governing body shall pass in establishing such districts.

Land selected for the active land use districts must be able to accommodate the development physically. This will require a considerable

amount of planning on the part of the town or village or whatever government may choose to establish the district. Services have to be provided for any increases in density that might occur, and advance planning is required for these. In this way, a community will have a plan and a schedule for providing services that will match the number of development rights which may be transferred into the active land use district:

2. *No land may be designated an active land use district unless the area has the physical properties including adequate drainage, soil stability, percolation or sewerage, groundwater yield or water supply and ventilation that will accommodate any increase in density that are permitted to occur as hereinafter provided.*

Those persons who own real property in active land use districts and own the development rights thereof may exercise those rights as governed by the existing laws dealing with land development, notably existing zoning and subdivision controls, and as hereinafter provided.

Development rights are allocated to property owners in the passive districts according to the development potential of their land. That is to say, a property owner would receive development rights worth forty residential dwelling units if he had forty acres already zoned to permit one dwelling unit per acre. If a marshland comprised ten of those acres and an existing ordinance or state law prohibited development on such a marsh, no development rights would be granted; the property owner would have, then, thirty development rights for residential units.

3. *Development rights in passive land use districts are limited as to their use in the ways hereafter specified.*

a. *Allocation of development rights in passive land use districts. Owners of land within designated integrated districts will calculate their development rights*

as individual rights to construct upon, build upon or otherwise develop land to the extent determined by the ratio of development rights to the area of developable land, such ratio to be determined by and with the type of use defined by the zoning ordinance in effect at the time the integrated district is established less any existing development where the values of real property among landowners is equivalent. Land which in the opinion of the local planning board or state office satisfies the health codes and building codes of the governments involved in establishing the integrated district and land that has not been preempted from development by legitimate action of the state of New York or its instrumentalities or by action of the United States of America shall be defined as "developable land."

The concept of *developable land* is an important one for TDR. It is an adaptation and expansion of the idea of a *buildable acre* from the zoning code of the Town of Putnam Valley in Putnam County (§66-2).

If a certain property owner's land is worth more than another's, he would be granted more rights than would the second. In the marketplace, all land is not valued the same, and, to reflect this, development rights should not be allocated as if it were.

Where inequities exist among values of lands in integrated districts, the governing body or bodies that establish the integrated district shall provide a ratio for the allocation of development rights that shall equalize the calculation of development rights among property owners by granting to owners of more valuable land more rights than they would otherwise receive. This ratio shall equalize the allocation of development rights based upon the value of the developable land within twenty per cent of the assessed value of the lowest valued parcel within the integrated district.

A size restriction exists for parcels of land in passive land use districts:

b. *Size.* At least twenty-five contiguous acres of land shall comprise every passive land use district as established under the provisions of this article. Every passive land use district shall be part of an integrated district.

The community actually takes development rights from landowners whose properties are in the passive land use districts. The compensation the landowners are given--compensation is required by the Fifth Amendment of the U.S. Constitution--is that they may sell their development rights to willing buyers in active land use districts. Obviously, the level of compensation is not *full* compensation; it is not the price that would be paid for the fee simple title to the property. However, the courts may judge it to be *just* compensation in light of the community's desire to control land use in the way it does and by use of TDR. It should be noted that the property holder retains ownership of the lands and, therefore, has the income it will produce from the resources it possesses:

c. *Development restriction.* Land in a passive land use district may be developed for residential purposes only to the extent that the landowner may build and maintain his primary dwelling on the land whether or not he retains ownership of the development rights. He may also subdivide the land into parcels of twenty-five acres or more, and he may devise the parcels. One primary dwelling may be placed on each parcel so subdivided and subsequently devised. There shall be no parcels of land in passive land use districts that are smaller than twenty-five acres, cemetery plots excepted.

There are several limitations to a landowner's rights on land in passive land use districts: Development cannot take place except:

1. the property owner may build and maintain his own home; and,
2. the owner may will to his heirs parcels of the land--at least twenty-five acres in size--on

which his heirs may build and maintain their homes.

Land in the passive districts may be used for its natural resources. These include:

- farming
- mining
- timbering
- preserving scenery
- maintaining open space (for, say, watersheds)
- safeguarding unique areas be they biological or historical.

d. *Permitted uses.* Land in passive land use districts shall be for conservation and natural resource use including agriculture or environmental protection purposes. The type or types of use permitted shall be stated and the purposes for permitting such a use shall be explained in the document recording the action of the governing body or bodies that establishes the integrated district of which the passive land use district is a part. Only the minimum amount of nonresidential construction essential to effect such stated use shall be permitted in passive land use districts. Once a permitted use is established, it cannot be exchanged for another permitted use except through a reassignment of use by the governing body or bodies involved which shall act in the manner hereinafter provided.

e. *Amortization of existing development.* It is within the purposes of authorized governments in New York state when they create integrated districts that the land reserved in passive land use districts shall be open and without development. When such districts are created, some development may already be in place in the passive land use district. Except such development that is permitted by provisions of this article, such existing development shall not be augmented, and if any structure, except those allowed by provisions of this article, shall be damaged by more than half, such structure shall be removed entirely, or if such structure be destroyed, it shall not be replaced. As such development is amortized, an equal number and kind of development rights will accrue to the landowner providing such development was in conformity with the zoning governing the allocation of such rights.

Development rights can be used in active land use districts—those areas where the community will permit development—, while they cannot be used in passive land use districts—those areas the community wishes to preserve or to set aside for natural resource exploitation. The development rights from the passive districts may be transferred to the active districts as long as both the active and passive districts involved in the transaction are within the same integrated district.

f. *Transfer of development rights from passive land use districts. Those persons who own development rights in a passive land use district may not exercise the rights thereof within the passive land use district. Such persons may assign the rights attendant to such land to owners of real property in active land use districts that are within the same integrated district as that of the passive land use district from which the development rights originated but to no others.*

The next section number 4 and its subsections of a through c describe how the additional development rights, those transferred, may be used. Note that the government that sets up the TDR system for the community must determine the amount of increased density that it will allow in the active land use district.

4. *Use of additional development rights in active land use districts. Persons who are assigned such development rights may build or construct and otherwise use the land within the active land use districts in accord with the uses established by existing zoning ordinances and to the additional extent allowable by supplemental zoning ordinances determined as hereinafter specified or to the additional extent allowable by the amount of development rights owned, whichever of these is the lesser.*

a. The governing body or bodies that establish integrated districts shall delimit the amount of additional development rights that may be used in all parts of active land use districts. Such delimitations shall be specified as a part of the resolution stating the intent to establish integrated districts.

b. A plan for providing necessary services to the development in active land use districts keyed to potential levels of density shall be a part of the resolution stating the intent to establish integrated districts.

c. The owners of development rights in active land use districts may assign rights whose use has been revived if the real property for which they were used originally has been destroyed to owners of land in the same or other land use subdistricts within the same integrated district and such additional development rights shall be utilized in the same manner as would rights assigned to owners of land in active land use districts from owners of development rights in passive land use districts.

Note also that it is incumbent upon the governing body to insure that the development that is permitted in the active land use district have services appropriate to its level of density. Such scheduling of services will require advance planning and more detailed planning than is presently done in many locations.

PROCEDURES

One of the most important aspects of state enabling legislation is the *procedures* it outlines for accomplishing its goal. The procedure should address the interests of all the parties who might be affected by the legislation. Conflicts among the parties or between a person and the law should be resolved fairly, and the bill should provide for this resolution. In addition, the rights and interests of the community whether it is called the *state*, the *city*, or the *town*, should be represented in a bill's procedures.

Many professionals in public administration would say that the

procedures are the law. The TDR bill presented here has extensive procedural guidelines. They serve a useful purpose, because they detail how a TDR system might best work for New York State. Despite the seemingly extensive detail, municipalities and other governments that would choose to use TDR would have great responsibilities in specifically keying TDR to the locale for its uses and its purposes. The state enabling legislation supplies little of the content for TDR.

§239-cc. Procedures.

1. *The governing body of one or more units of government with general taxing power in New York state may establish one or more integrated districts and the attendant active land use districts for the purposes and under the provisions stated in this article. County governments may act to establish integrated districts only with the official and recorded concurrence of the municipalities whose land areas will be affected.*

2. *Action by governing body. When the governing body of an authorized government unit shall decide to adopt the control of land under the provisions of this article, their action shall begin with passage of a resolution by a simple majority stating that body's intent to adopt integrated, active land use and passive land use districts, and the boundaries of these shall be specified accurately.*

a. *Such resolution shall be published in the newspaper or newspapers of general circulation in the area to be affected by the districts within ten days after adoption of the resolution.*

b. *The official or officials charged with recording deeds and titles in the area to be affected by the districts shall make known, insofar as reasonably possible, to all property owners on record the proposal to establish such districts and the location of the districts and how the establishment of the districts will affect their interests in their land before such districts may be established. Such notice to property owners shall precede the public hearing that is hereinafter mandated.*

c. *A public hearing shall be held on such legislative intent, in the manner hereinafter provided.*

d. The governing body, giving due consideration to expressed interests from such public hearing may modify boundaries of the proposed districts, and the governing body may then adopt such boundaries and create such districts. Those persons who are unsatisfied with the legislative action, and having already expressed such disagreement at the public hearing without subsequent relief, may appeal such decision as hereinafter provided. If a landowner's interests be newly affected by the modification of the district boundaries, he may file testimony with the governing body, and it shall be an amendment to the record of the hearing.

Title

Development rights are real property. Transactions involving them should be recorded just as are transactions involving real property. The appropriate part of New York State Law is amended in section three in this bill to specify that development rights are to be recorded in this way. That is Section 290 of the Real Property Law. Sections 315 and 316 refer to recording deeds:

6. Recording title of development rights.

a. All transfers of development rights within established integrated districts shall be a conveyance as defined in section two hundred ninety of the real property law.

b. Proper recording of the transaction shall be made as specified in sections three hundred fifteen and three hundred sixteen of the real property law.

Therefore, when a search is done on a title, a prospective buyer will be able to find out the status of the development rights; that is, whether they have been sold from a passive district, or whether rights had been added in an active district. Were a person to buy land affected by a TDR system, he would receive the development rights added to it--if some had been transferred to it; or, he would buy the land without development rights--if they had been transferred from it.

When an integrated district is first set up, the initial issuance of development rights should be recognized by officially recording the amount apportioned to each landowner. The allocated and recorded number of development rights will probably be represented by certificates for development rights issued by the government to property owners.

Tax

Property taxes are collected on the basis of the market value of land. If development rights are added to a parcel of land, its value will increase on the market. The higher potential density for that land gives it a higher value in the marketplace because the property could generate higher income with added development rights.

On the other hand, if development rights are transferred from land, it is worth less as an income-producing commodity. Therefore, its assessed value and property tax would be less. The *resource-producing* value of the land is unchanged; for example, its capacity to produce farm products is not affected by any transfer of development rights. The land's assessed value would reflect only its potential to produce income from its natural resources:

7. *Property tax and development rights. The development rights of land constitute a significant portion of the market value of land, and they shall be taxed as specified in the real property tax law of New York state. When all or a portion of the development rights of a land parcel is sold, the commodity market value of that parcel in the amount proportional to the number of rights sold as compared with total rights is removed in perpetuity. Those officials who assess land and collect property taxes shall recognize the reduction in land valuation; similarly, when development rights on active land use districts are augmented, an increase in the value of the real property shall be recognized.*

Later in the bill in section four, the appropriate part of New York State Law dealing with property taxes is modified specifically to include development rights as a consideration in land valuation. This is section 102 of the Real Property Tax Law.

CHANGES

The first draft of this bill was inflexible. It did not allow a community to respond to changing conditions of land use. One of the most important elements of a control on land use is permanence; however, that should not take precedence over the realistic anticipation of gradual changes in population and land uses within a community.

This draft of the bill attempts to be flexible while maintaining control over land use:

§239-dd. Additions of development rights.

1. *The governing body of the government, or the governing bodies of the governments, that created an integrated district may decide that the social welfare within such such district demands that additional population be accommodated within the integrated district. The governing body or bodies shall then propose additions to densities of development allowable within the district and may approve it, following hearings as hereinafter provided.*

2. *The increased density allocation shall take the form of a multiplier. Governments may choose to use a different multiplier for differently zoned uses, such as industrial, commercial, or residential. However, the selected multiplier shall uniformly be applied to every parcel of land with the same use designated by zoning within the integrated district.*

3. *The additional development rights shall be apportioned in amount to all landowners of record within the integrated district according to the areal size or value, as appropriate, of their land holdings that comprise developable land and shall be apportioned in use according to the zoning at the time the additional rights are created.*

4. *The provisions of this article and other laws shall govern the disposition of the increased number of development rights created. In no case shall development rights be exercised in passive land use districts except as provided above.*

The community, then, could decide to accommodate more population, or more commercial space or more industry. These different types of developments could have their density potential increased to different degrees.

However, development still would not be allowed in the passive land use districts. Landowners in passive districts would simply be allocated additional development rights that they would be allowed to assign, as before, to landowners in active districts. The landowners in active districts would of course, receive the density increment also.

The resource use of the land in passive land use districts may gradually become uneconomical. The landowner would, then, wish to find another productive use for the land. For example, a quarry may become mined out, or the remaining stone may be too costly to mine. The legislative body may then change the permitted land use to permit the landowner to reclaim the mine and use it for unintensive recreation, for example. The land would remain largely undeveloped, however, because it has no development rights:

§239-ee. Modification of land use in passive land use districts. The governing body or governing bodies that establish an integrated district may amend their act from time to time with regard to the permitted use of the land in passive land use districts in response to changing social, economic or physical circumstances. In any event, the body or bodies shall review the permitted land use at least once every five years.

Such governing body or bodies may modify the permitted use of the passive land use district provided that the existing permitted use is no longer beneficial or economical. Hearings shall be held, as hereafter specified, before any action is taken to modify the use of land in passive land use district shall be in accord with the permitted uses as specified in this article for such districts.

CROSSING GOVERNMENT BOUNDARIES

The desire to control a particular type of land may not stop at the town line or the county boundary. The next section of the bill permits local governments jointly to establish integrated districts:

§239-ff. Intergovernmental integrated districts.

1. *Two or more municipalities may choose to form an integrated district. In such case, the governing bodies of the municipalities involved must act contemporaneously. Each governing body must pass a resolution stating its intent; the resolutions shall then be put together and transmitted for referral as hereinafter specified.*

In controlling the land use in integrated districts that cross local government boundaries, a special coöperative government body is formed. This body is called a *council of governments* (abbreviated as *COG*). It is a convenient way for governments to act together. COGs have been used for over twenty years for various purposes across the United States. The details of the establishment of the COG follows:

2. *If the governing bodies do jointly establish an integrated district, they must then formulate through a contract a council of governments as follows:*

a. *If the acting governments be towns or villages, the council shall consist of a representative from the governing body of each town or village, a representative from the county in which it is located, and, if the municipality be a town, representatives from each village or city located in the town. Such representatives of the county or cities or villages shall be designated by their respective municipal governing bodies respectively.*

b. If the acting units of governments be counties, the council shall consist of a representative from the governing body of each county, from a state office, as hereafter provided, from the regional planning agency, if any, and from each town and village which contains any part of the integrated district. Such municipal representatives shall be designated by their respective municipal governing bodies.

c. The members of such council shall receive no salary or compensation for their services as members of such council.

d. The governing body of each member government participating in a council of governments is hereby authorized independently, or in collaboration with other governments, at their discretion to appropriate and raise by taxation money for the expenses of such council, and such governing body shall not be chargeable with any expenses incurred by such council except pursuant to such an appropriation.

In addition, such council is hereby authorized to receive any New York state or federal funds for which such council may qualify, and is further authorized to receive any awards, gifts, grants, requests or devices from any source public or private.

e. The council shall convene at least once each year to examine the status of the intergovernmental integrated district, and it shall make recommendations to the participant governing bodies concerning any changes that may from time to time be recognized in the integrated district. The council shall carefully note the adherence by the concerned governments to the provisions and purposes of this article in governing the land area within the integrated district and shall make a report of such adherence every five years or more frequently if conditions warrant to the state office.

THE STATE OFFICE

The State of New York is ultimately responsible for the use of land within the state's boundaries for the welfare of the people. The state has largely delegated its police power to the municipalities. This bill provides that an administrative agency of the state, an office that would be named by the governor, would examine the proposed establishment of all integrated districts:

§239-gg. Duties of the state office.

1. *There shall be established a state office which shall monitor the adherence to the provisions of this article by those local governments which choose to form integrated districts.*

2. *The state office shall insure that areas of regional, state, or national significance and importance are not adversely affected by the integrated districts formed by local governments.*

3. *If the state office disapproves of part of an integrated district, it shall recommend modifications to the concerned local government, and that local government shall not implement such modifications. If it disagrees with such modifications, it may appeal as hereinafter provided. The state office may disapprove entirely any proposed integrated district, and integrated districts thus disapproved may not be established.*

4. *In all examinations of integrated districts, the state office shall act after consultation with the appropriate regional planning agency, if there be one.*

Review by the state should accomplish at least two objectives. First, the state office should insure that integrated districts are organized according to the procedures established by law. Second, it will bring a regional perspective to the land use decisions that require such a broadened view.

Often, local governments are concerned only with their own relatively small land areas. Often, too, this is adequate and even desirable. It is adequate, because many individual land use decisions affect only a limited area and limited number of people. It is desirable, because the local government is closest to and is the most informed entity about a particular situation and is, therefore, usually the most competent to deal with it.

However, some land use decisions require regional considerations. For example, if a town decides to implement large-lot-zoning, say one dwelling per five acres, the surrounding municipalities will be forced to accept the people who cannot be accommodated within that town but

who still wish to live in that area. In its review, the state office will confer with regional planning agencies, and these regional bodies should assist the state by supplying pertinent data on the region.

A later section of the bill, section five, requires that municipal decisions to establish integrated districts be referred to county planning agencies. This, too, is to bring an element of regional concern into the local land use decision-making procedure.

Several other types of decisions are already referred to county planning agencies. These include changes of use in zoning districts near state roads on county and municipal boundaries. Local government proposals to establish integrated districts will be added.

GOVERNMENT AND INTEGRATED DISTRICTS

Units of government will abide by the guidelines set forth for land uses in active and passive land use districts.

§239-hh. Government participation in development rights transactions. Banks of development rights.

1. *All units of government in the state of New York are bound by the provisions of this article, and no unit of government may construct or build any facility within an integrated district unless that facility be in accord with the provisions governing active and passive land use districts.*

Units of government may obtain development rights through condemnation proceedings:

No unit of government shall build any facility in an active land use district unless it shall own the required development rights that will accommodate such facility. Units of government may use authorized powers of eminent domain to acquire the required amount of development rights from owners of development rights in a passive land use district when preparing to build a facility for governmental purposes in an active land use district. Such use of eminent domain shall be governed under the procedures of condemnation law in New York state, and the required development rights shall be secured from owners of such rights in pro-

portion to the amount of rights held by each at the time the condemnation proceedings are instituted.

Units of government are not hampered in carrying out their mandated duties by being absolutely prevented from use of land in passive districts. They may build in passive districts only if no alternative exists, however. A town may, for example, have to build a sewage treatment plant in a passive district:

Units of government may build government facilities that further the welfare of the population, other than general purpose office buildings, in passive land use districts when such facilities do not compromise the purposes for which the passive land use district was established or when it can be demonstrated that no reasonable alternative exists.

Development rights may be accumulated, too, by local governments when they can demonstrate a use for them. They cannot be banked only to preempt development. Passive districts are to be used to control development:

2. *A bank of development rights may be established by units of government in New York state for use in active land use districts when such reserve can be shown to be in the public interest and when such reserve shall serve defined and scheduled governmental purposes.*

PUBLIC INPUT

Before a town board or a village board or other authorized legislative body may pass a resolution to establish TDR, it is required to hold a hearing to find out what the community thinks of the idea. The hearing will be concerned with a specific integrated district, that one being proposed for establishment by the governing body. Those persons who had been connected with proposing the integrated district, their plans and reports are required to be present at the hearing:

§239-ii. Hearings. Referrals. Appeals.

1. When a governing body acting under the provisions of this article is directed to hold a public hearing, it shall use the procedure as follows:

A public hearing shall be scheduled by the governing body directed to hold the hearing. Notice of the hearing shall be published at least twice in the newspaper or newspapers of general circulation in the locality or localities concerned not more than twenty days and again not less than ten days prior to such hearing.

At least four fifths of the total number of the membership of the governing body shall be present, or the governing body may designate one of their members from each political party represented in the body to act for the body at the hearing. Reports and background research as well as experts and specialists who designed the integrated district under question shall be present at the hearing.

At the hearing, the governing body or the designated representatives, who shall report to the full governing body, shall take into full consideration the comments of all complaining, supporting and interested parties. At its next meeting, the governing body shall assess the comments of the hearing and those of the referral agency. It may modify the integrated district if it chooses, or it shall modify the integrated district as directed by the referral agency before the district in question is established. The legislative body may then move to implement the integrated district.

The last paragraph mentions referral agencies. Depending upon the type of district being proposed, different agencies act as a review authority.

2. Referrals.

a. Municipal integrated districts. Whenever the legislative body of a municipality shall state its intent to create integrated districts, it shall be referred to a county, metropolitan or regional planning agency as specified in section two hundred thirty-nine-m of the general municipal law as amended.

b. Intermunicipal integrated districts. Whenever two or more municipalities within one county decide to create an intermunicipal integrated district, their stated intent shall be referred to a county, metropolitan or regional planning agency as specified in section two hundred thirty-nine-m of the general municipal law. The concerned municipalities may not act contrary to the referral agency's disapproval or recommended modifications. If the concerned municipalities dispute the referral agency's findings, they may appeal as hereinafter provided.

c. County integrated districts. Whenever the governing body of a county shall declare its intent to create an integrated district which shall be within five hundred feet of the county's boundaries or shall cross the boundaries of two or more municipalities, such intent shall be referred to the designated state office. This state office shall confer with the proper regional planning board or commission and they shall together determine whether or not to approve the county's action. The state office shall within thirty days of referral transmit such determination and its full reasoning to the county.

d. Intercounty integrated districts. In the event that two or more counties shall jointly declare their intent to form an integrated district, they shall jointly follow the procedure provided herein for county districts, and they shall similarly be referred to the state office.

Complaints

Private Individuals

A property owner may be dissatisfied with the effect a town's TDR scheme will have on his land. He will initially bring his complaint before the hearing held on the town's proposal for an integrated district. If the action of the town's board subsequent to the complaint does not satisfy the objection of the property owner, he may require that the town board refer his complaint to the county planning board for review. (In the case of a county's establishment of an integrated district, complaints would be referred to the state

of ice.) As a last recourse, the procedures established by New York law governing grievances against public bodies is used; that is Article 78 of the Civil Practice Law and Rules. The following section of the bill deals with appeals:

3. Appeals of decisions concerning actions to establish integrated districts may be made by aggrieved parties as follows:

a. If the complaining party was a participant in the initial hearing on establishment of the integrated district, and if the governing body did not act to accommodate the complaint when it acted to implement the district, the aggrieved party may transmit its complaint to the governing body in writing and request the matter be referred. The governing body must then refer the complaint and its proposal for establishment of the integrated district to the county planning agency if the matter concerns a municipal or intermunicipal district, and the governing body must refer the complaint and its proposal to the state office if the matter concerns a county or intercounty district.

The governing body must then act within the directives of the referral agency. If the aggrieved party still be unsatisfied, it may bring suit against the referral agency, and the court shall determine whether or no the integrated district is established in a way contrary to the provisions of this article using the procedures specified in article seventy-eight of the civil practice law and rules.

Legislative Bodies

A town or village board or a county legislature might have a complaint against the agency to which it is required to refer its plans for an integrated district. The legislative body is, then, required to meet with the referral agency to attempt to solve any differences of opinion. As a final recourse, too, the governing body acts using Article 78:

b. If the complaining party is a governing body that acted to establish the integrated district, it shall designate from its membership representatives, one from each political party of that body, who will confer with the referral agency. The governing body shall direct its representatives to negotiate modifications on the proposed integrated district with the referral agency and the bounds within which these negotiations may range. If the governing body accepts the negotiated modifications, it must formally adopt them before the integrated district may be established.

If the governing body finds these negotiations unacceptable, it may bring suit against the referral agency, and the court shall determine whether or no the integrated district is established in a way contrary to the provisions of this article using the procedures specified in article seventy-eight of the civil practice law and rules.

AMENDMENTS TO EXISTING LAWS

Section 3 of this bill simply specifies that development rights are included in the definition of *real property* in the New York State Real Property Law. Section 4 does the same for the definition of *real property* in the state's Real Property Tax Law.

Development rights are real property. This is evident in the general definition found in New York's General Construction Law, §40: 'The term real property includes real estate, lands, tenements and hereditaments, corporal and incorporeal.'

Sections 3 and 4 of the bill follow:

§3. Section two hundred ninety of the real property law is hereby amended to read as follows:

§290. Definitions; effect of article.

1. The term "real property" as used in this article includes lands and their development rights as such rights are defined in article twelve-G of the general municipal law, tenements, hereditaments and chattles real, except a lease for a term not exceeding three years.

....

§4. Section one hundred two of the real property tax law is hereby amended to read as follows:

§102. Definitions.

When used in this chapter, unless otherwise expressly stated or unless the context otherwise requires:

....

12. "Real property," "property" or "land" mean and include:

(a) Land itself above and under water, including *development rights as such rights are defined in article twelve-G of the general municipal law*, trees and undergrowth thereon and mines, minerals, quarries and fossils in and under the same, except mines belonging to the state:

....

Section 5 of this bill, as was mentioned above, amends the General Municipal Law of the State to provide for referral to a county or regional planning agency municipal action or integrated districts:

§5. Section two hundred thirty-nine-m of the general municipal law is hereby amended to read as follows:

§239-m. Notice of certain proposed municipal zoning actions to be submitted to county, metropolitan or regional planning agency; report thereon; final action.

In any city, town or village which is located in a county which has a county planning board, commission or other agency, hereinafter referred to as a county planning agency, or, in the absence of a county planning agency, which is within the jurisdiction of a metropolitan or regional planning commission, board or other agency, duly created pursuant to the provisions of law, hereinafter

referred to as a metropolitan or regional planning agency, each municipal body which has jurisdiction to adopt or amend zoning regulations, [or] to issue special permits or grant variances pursuant to such regulation, or to establish integrated districts, shall, before taking final action on certain of such matters, refer the same to such county, metropolitan or regional planning agency. The term "special permit" shall be deemed to include any special permit, use permit, exception, or other special authorization which a board of appeals, planning board or legislative body is authorized to issue under the provisions of any zoning ordinance.

The matters covered by this section shall include: (a) any municipal zoning regulation, or any amendment thereof, which would change the district classification of or the regulations applying to real property lying within a distance of five hundred feet from the boundary of any city, village, or town, or from the boundary of any existing or proposed county or state park or other recreation area, or from the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway, or from the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines, or from the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; [and] (b) any special permit or variance affecting such real property within such distance of five hundred feet; and (c) *proposals of intent to establish municipal integrated districts or intermunicipal integrated districts.* The term "proposed" shall be deemed to include only those recreation areas, parkways, thruways, expressways, roads or highways which are shown on a county plan adopted pursuant to subdivision two of section two hundred thirty-nine-d of the general municipal law or adopted on an official map pursuant to section two hundred thirty-nine-g of such law.

Within thirty days after receipt of a full statement of such referred matter, the county, metropolitan or regional planning agency to which referral is made, or an authorized agent of said agency, shall report its recommendations thereon to the referring municipal agency, accompanied by a full statement of the reasons for such recommendations. If such planning agency fails to report within such period of thirty days or such longer period as may have been

agreed upon by it and the referring agency, the municipal body having jurisdiction to act may do so without such report. If such planning agency disapproves the proposal, or recommends modification [thereof] *to the change in the municipal zoning regulation, or amendment thereof, or to the special permit or variance*, the municipal agency having jurisdiction shall not act contrary to such disapproval or recommendation except by a vote of a majority plus one of all members thereto and after the adoption of a resolution fully setting forth the reasons for such contrary action. *If such planning agency disapproves a proposal for the establishment of an integrated district, the municipality may appeal as provided in section two hundred thirty-nine-ii of the general municipal law.*

Within seven days after final action by the municipal agency having jurisdiction on the recommendations, modifications or disapproval of a referred matter, such municipal agency shall file a report of the final action it has taken with the county, metropolitan or regional planning agency which has made the recommendations, modifications or disapproval. *If the matter pertained to an integrated district, such municipal agency shall notify all property owners who will be affected.*

DATE FOR BILL'S EFFECTIVENESS

Not all municipalities or counties will be eligible to implement the bill immediately. Only those areas with large populations may; it is expected that these areas will have sophisticated planning and land use operations. TDR will require skilled and careful implementation.

After the larger areas have had an opportunity to gain experience with TDR, with this bill, and with TDR's operation in New York, the other areas will be permitted to use TDR if they choose. Section 6, the last section, follows:

§6. This act shall take effect immediately for the state of New York, for municipalities with a population of fifty thousand or more and all counties with a population of one hundred twenty-five thousand or more as enumerated by the census of population conducted by the bureau of the census of the United States in the year nineteen hundred seventy.

This act shall take effect for all other municipalities and all other counties on April first of the fourth year after passage.

THE BILL'S FUTURE

Improvements in this bill over the first draft are due in no small measure to the comments made by persons in Putnam, Rockland, and Suffolk Counties and the others who commented on the first draft. The form the bill is in now outlines a comprehensive and strong system for accommodating TDR, that complex land use control.

It was mentioned above that the format of enabling legislation provides an excellent academic vehicle for making the TDR concept concrete. Readers' comments are welcome on the ideas presented in this second draft. This TDR system will be the basis for testing hypothetically transfers of development rights through further research.

TRANSFER OF DEVELOPMENT RIGHTS:

A SYSTEM

FOR NEW YORK STATE

OUTLINE OF PROVISIONS

Section 1. Legislative Findings and Declaration of Purpose

Section 2. Amendment to the *General Municipal Law*: 'Active and Passive Land Use Districts'

§239-z. Definitions

Development Rights
Integrated District
Active Land Use Districts
Passive Land Use Districts
State Office

§239-aa. Purposes

§239-bb. Uses of Districts

§239-cc. Severability of Development Rights

§239-dd. Use of Development Rights

§239-ee. Procedures; (Title and Tax)

§239-ff. Additions of Development Rights

§239-gg. Modification of Land Use in Passive Land Use Districts

§239-hh. Intergovernmental Integrated Districts

§239-ii. Application to Public Construction and Use of Lands
Within Integrated Districts

§239-jj. Hearings; Referrals; Appeals

Section 3. Amendment to *Real Property Law*

Section 4. Amendment to *Real Property Tax Law*

Section 5. Amendment to the *General Municipal Law* Concerning Review by
County, Metropolitan, or Regional Planning Agencies

Section 6. Amendment to the *Executive Law* to Provide for the State Office
for Land Use Review

Section 7. Dates for Bill's Effectiveness

TRANSFER OF DEVELOPMENT RIGHTS:
A SYSTEM
FOR NEW YORK STATE

AN ACT

to provide in New York State for the enactment of guidelines governing the use of development rights and their transfer from and to specified districts and providing for the establishment and utilization of these land use districts, constituting amendments to the general municipal law, the real property law, the real property tax law and the executive law.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1: Legislative findings and declarations of purpose: It is hereby found and declared that the land of the State of New York is the basic and unique resource upon which depends the public health and welfare.

The competition for use of the land resources of New York is intense and conflicting, especially in the urban areas.

Utilization of the land resource must be accommodated to serve the public health and welfare, including the economic interests of the people of New York State, yet the integrity of the resources must not be compromised because future generations of New York citizens will depend upon this same land.

It is recognized that the land contains several and diverse resources. Some of these are intrinsic, such as the land's capacity to grow agricultural crops and timber for harvest and use; the mineral wealth held by the land; the watershed properties; the scenic attraction of land areas because of their natural features. Other resources have been attached to the land by cultural norms and social institutions. The resource of locus is recognized as such an attached resource, in that land has varying degrees of desirability for use as sites of society's industrial, commercial, institutional, residential and other needs.

EXPLANATION--Matter in *italics* is new; matter in brackets [] is old law to be omitted.

It is found that the use of land's intrinsic resources often conflict with land's attached resources, yet both are essential for a functioning social system.

Therefore, the legislature hereby finds and determines that there is a need rationally to plan for and control land use within the state, and that such planning and control will further the public health and welfare.

§2. The general municipal law is hereby amended by adding thereto a new article, to be article twelve-G, to read as follows:

ARTICLE 12-G

ACTIVE AND PASSIVE LAND USE DISTRICTS

Section 239-z. Definitions.

1. *Development rights.* The term "development rights," as used in this article, includes the right to use real property for subdivision, construction, use and occupancy of any structure thereon, including any of the foregoing uses for industrial, commercial, institutional or residential purposes; provided, however, that this shall not include timber, mineral, agricultural, or ecological uses and any structures necessarily related thereto.

2. *Integrated District.* The legislature of the State of New York or a governmental subdivision thereof, by its governing body, may establish a geographical area to be designated an integrated district. Such integrated districts shall be a contiguous section of real property bounded and described as determined by the establishing authority. In the event that such integrated district extends across boundaries of more than one governmental subdivision, such districts shall only be established by cooperative effort of the governmental subdivisions as hereafter provided.

Such integrated district shall include parcels of real property with designations as active land use or passive land use subdistricts.

3. *Active land use districts.* A designated land area within an integrated district wherein development rights may be exercised subject to existing zoning controls.

4. *Passive land use districts.* A designated land area within an integrated district in which development rights may not be exercised except as hereinafter provided.

5. State Office. The office for land use review in the executive department.

§239-aa. Purposes. The purpose for which the state of New York or a subdivision thereof may act to establish integrated districts are:

1. to establish areas for development that will provide a population density adequate to support governmental services including but not limited to sewers, water, transportation and utilities;

2. to provide a pattern of human settlement that will conserve essential resources of land and energy;

3. to provide control over urban development of areas including but not limited to agricultural, mineral and timber lands; areas with rare, unusual or unique geologic formations or biotic communities; and archeological and historic sites.

4. to conserve open spaces and land for parks and areas necessary for the health, welfare, recreation and enjoyment of the people of the state of New York and the well-being of the state's communities.

5. to provide for planned control of land use and development wherein a community may foster provision of private services such as industrial, commercial, and residential development and wherein the governmental subdivision may provide public services and facilities necessary for the health, safety, and welfare of all members of the community.

§239-bb. Uses of Districts.

1. In establishing an integrated district, consideration shall be given to the relationships among natural resources, the social, political and economic systems which exist within the boundaries of the proposed integrated district.

2. No land may be designated an active land use district unless the area has the physical properties including adequate drainage, soil stability, percolation or sewerage, ground-water yield or water supply and ventilation that will accommodate any increases in density that are permitted to occur as hereinafter provided.

3. The governing body or bodies shall determine the minimum size parcel of real property that may qualify to be designated as a passive land use district. Such size shall be based upon the area required to effect the purpose for creation of such passive land use district.

4. Permitted uses. Land in passive land use districts shall be for conservation and natural resource use including agriculture or environmental protection purposes. The type or types of use permitted shall be stated and the purposes for permitting such a use shall be explained in detail in the document recording the action of the governing body or bodies that established the integrated district of which the passive land use district is a part. Nonresidential construction necessarily related to such purpose or purposes shall be permitted in passive land use districts. Once a permitted use is established, it cannot be exchanged for another permitted use except through a reassignment of use by the governing body or bodies involved which shall act in the manner hereinafter provided.

5. Amortization of existing development. Following the establishment of an integrated district, all development in the attendant active and passive land use districts shall conform to the purposes set forth in the document establishing the integrated district. Except such development that is permitted, such existing development shall not be augmented, and if any structure shall be damaged by more than half of its fair market value, such structure shall be removed entirely, or if such structure be destroyed, it shall not be replaced. As such development is amortized, development rights shall accrue to the landowner in the number as specified in this article.

§239-cc. Severability of development rights.

1. Upon the creation of an integrated district as herein defined, the development rights of all real property located within such integrated district may be conveyed separately and independently of the land for which such development rights were issued.

2. Allocation of development rights. Upon the creation of an integrated district, development rights shall be allocated to the landowners existing within such integrated district. The number of development rights shall be assigned to developable land according to the assessed valuation of all property on the tax rolls of the taxing authorities within the integrated district determined by the last certified tax rolls prior to the creation of the integrated district, less the assessed valuation of any existing development.

a. The governing body or bodies that establish the integrated district shall provide a ratio for the allocation of development rights that shall equalize the calculation of development rights among property owners by granting to owners of more valuable land more rights than they would

otherwise receive. This ratio shall equalize the allocation of development rights to within twenty percentum of the assessed value of the lowest valued parcel of developable land within the integrated district.

The character of development rights, including business and industrial, commercial or residential, shall be determined by the zoning ordinance in effect at the time the integrated district is established.

b. Land which in the opinion of the local planning board or state office satisfies the health codes and building codes of the governments involved in establishing the integrated district and land that has not been preempted from development by legitimate action of the state of New York or its instrumentalities or by action of the United States of America shall be defined as "developable land."

3. Upon creation of the integrated district the unit or units of government that established such district shall issue a written instrument to all owners of real property evidencing the development rights each such owner has. Such written instrument shall be subject to recording as specified in section three hundred fifteen and section three hundred sixteen of the real property law. A record of the initial issuance of development rights and all official documents pertaining to the creation of the integrated district shall be filed with the county clerk in the county or counties in which such integrated district is situated.

§239-dd. Use of development rights.

1. Active land use districts. Those persons who own real property in active land use districts and own the development rights thereof may exercise those rights as governed by the existing laws dealing with land development, notably existing zoning and subdivision controls, and as hereinafter provided.

2. Passive land use districts. Those persons who own development rights in a passive land use district may not exercise the rights thereof within the passive land use district except as hereafter provided.

3. Transfer of development rights. Owners of development rights in designated integrated districts may assign such rights to owners of real property in active land use districts that are within the same integrated district as that from which the development right originated but to no others.

4. Use of additional development rights in active land use districts. Persons who own development rights may build or construct and otherwise use the land within the active land use districts in accord with the uses established by existing zoning ordinances and to the additional extent allowable by supplemental zoning ordinances determined as hereinafter specified or to the additional extent allowable by the amount of development rights owned, whichever of these is the lesser.

a. The governing body or bodies that establish integrated districts shall delimit the amount of additional development rights that may be used in all parts of active land use districts. Such delimitations shall be specified as a part of the resolution stating the intent to establish integrated districts.

b. A plan for providing necessary services to the development in active land use districts keyed to potential levels of density shall be a part of the resolution stating the intent to establish integrated districts.

c. The owners of development rights in active land use districts may assign rights whose use has been revived if the real property for which they were used originally has been destroyed to owners of land in the same or other active land use districts within the same integrated district.

5. Permitted development and subdivision of land in passive land use districts. The owner of real property in a passive land use district may build and maintain his primary dwelling on the land. He may also subdivide the land into parcels of twenty-five acres or more, and he may devise the parcels. One primary dwelling may be placed on each parcel so subdivided and subsequently devised. There shall be no parcels of land in passive land use districts so subdivided that may be smaller than the minimum size established by the governing body that established the passive land use district.

§239-ee. Procedures.

1. Establishment. The legislature of the state of New York or the governing body of a subdivision thereof may establish one or more integrated districts and the attendant active and passive land use districts for the purposes and under the provisions stated in this article. County governments may act to establish integrated districts only with the official and recorded concurrence of the municipalities whose land areas will be affected.

2. Action by governing body. The governing body of the governmental subdivision shall evidence its decision to adopt land use control under the provisions of this article by the passage of a resolution stating that body's intent to create an integrated district. Such resolution shall require passage by a simple majority and shall include all of the requirements of an integrated district as set forth in this article.

a. Such resolution shall be published in two newspapers of general circulation in the area to be affected by the districts within ten days after adoption of the resolution.

b. The governing body establishing such integrated district shall make known, insofar as reasonably possible, by notice to all property owners on record the proposal to establish such districts and the location of the districts and how the establishment of the districts will affect their interests in their land before such districts may be established. Such notice to property owners shall precede the public hearing that is hereinafter mandated.

c. A public hearing shall be held on such legislative intent, in the manner hereinafter provided.

d. The governing body, giving due consideration to expressed interests from such public hearing may modify boundaries of the proposed districts, and the governing body may then adopt such boundaries and create such districts. Those persons who are unsatisfied with the legislative action, and having already expressed such disagreement at the public hearing without subsequent relief, may appeal such decision as hereinafter provided. If a landowner's interests be newly affected by the modification of the district boundaries, he may file testimony with the governing body, and it shall be an amendment to the record of the hearing.

6. Recording title of development rights.

a. All transfers of development rights within established integrated districts shall be a conveyance as defined in section two hundred ninety of the real property law.

b. All written instruments evidencing development rights shall be subject to sections three hundred fifteen and three hundred sixteen of the real property law.

7. Property tax and development rights. When all or a portion of the development rights of a land parcel is sold, the market value of that parcel in the amount proportional to the number of rights sold as compared with total rights

issued for that parcel of land is removed in perpetuity. Those officials who assess land and collect property taxes shall recognize such reduction in land valuation; similarly, when development rights on active land use districts are augmented, an increase in the value of the real property shall be recognized.

§239-ff. Additions of development rights.

1. The governing body of the government, or the governing bodies of the governments, that created an integrated district may decide that the social welfare demands that additional population be accommodated within the integrated district. The governing body or bodies shall then propose additions to densities of development allowable within the district and may approve it, following hearings as hereinafter provided.

2. The increased density allocation shall take the form of a multiplier, and that multiplier shall be applied to the densities described by present zoning ordinances. Governments may choose to use a different multiplier for differently zoned uses, such as industrial, commercial, or residential. However, the selected multiplier shall uniformly be applied to every parcel of land with the same use designated by zoning within the integrated district.

3. The additional development rights shall be apportioned in amount to all landowners of record within the integrated district according to the valuation of their landholdings that comprise developable land and shall be apportioned in use according to the zoning existing at the time the additional rights are created.

4. The provisions of this article and other laws shall govern the disposition of the increased number of development rights created. In no case shall development rights be exercised in passive land use districts except as provided above.

§239-gg. Modification of land use in passive land use districts. The governing body or bodies which establish an integrated district shall periodically review the permitted use of the land in passive land use districts with regard to social, economic, ecological and physical circumstances. If such governing body or bodies determine that a need exists for amendment to the permitted use of the land in passive land use districts, then such body may amend the initial creation of the integrated district with respect to

the passive land use district area. Such review shall take place at least once within each five year period following the creation of an integrated district.

Hearings shall be held, as hereafter specified, before any action is taken to modify the use of land in passive land use districts. Such use shall be in accord with the permitted uses specified in this article for such districts.

§239-hh. Intergovernmental integrated districts.

1. Two or more municipalities or two or more counties may choose to form an integrated district. In such case, the governing bodies of the municipalities or counties involved must act contemporaneously. Each governing body must pass a resolution stating its intent; the resolutions shall then be put together and transmitted for referral as hereinafter specified.

2. If the governing bodies do jointly establish an integrated district, they must then formulate through a contract a council of governments as follows:

a. If the acting governments be municipalities, the council shall consist of a representative from the governing body of each municipality, a representative from the county in which it is located, and, if the municipality be a town, representatives from each village or city located in the town. Such representatives of the county or cities or villages shall be designated by their respective governing bodies.

b. If the acting units of governments be counties, the council shall consist of a representative from the governing body of each county, from a state office, as hereafter provided, from the regional planning agency, if any, and from each municipality which contains any part of the integrated district. Such municipal representatives shall be designated by their respective municipal governing bodies.

c. The members of such council shall receive no salary or compensation for their services as members of such council.

d. The governing body of each member government participating in a council of governments is hereby authorized independently, or in collaboration with other governments, at their discretion to appropriate and raise by taxation money for the expense of such council, and such governing body shall not be chargeable with any expenses incurred by such council except pursuant to such an appropriation.

In addition, such council is hereby authorized to receive any New York state or federal funds for which such council may qualify, and is further authorized to receive any awards, gifts, grants, bequests, or devises from any source public or private.

e. The council shall convene at least once each year to examine the status of the intergovernmental integrated district, and it shall make recommendations to the participant governing bodies concerning any changes that may from time to time be recognized in the integrated districts. The council shall carefully note the adherence by the concerned governments to the provisions and purposes of this article in governing the land area within the integrated district and shall make a report of such adherence every five years or more frequently if conditions warrant to the state office.

§239-ii. Application to public construction and use of lands within integrated districts.

1. Any public use of lands within an integrated district other than by the governmental subdivision creating the integrated district shall be subject to all provisions in this article, except as may be exempted by the governmental subdivision which created the integrated district.

No unit of government shall build any facility in an active land use district unless it shall own the required development rights that will accommodate such facility. Units of government may use authorized powers of eminent domain to acquire the required amount of development rights from owners of development rights in a passive land use district when preparing to build a facility for governmental purposes in an active land use district. Such use of eminent domain shall be governed under the procedures of condemnation law in New York state, and the required development rights shall be secured from owners of such rights in proportion to the amount of rights held by each at the time the condemnation proceedings are instituted.

Units of government may build government facilities that further the welfare of the population, other than general purpose office buildings, in passive land use districts when such facilities do not compromise the purposes for which the passive land use district was established or when it can be demonstrated that no reasonable alternative exists.

2. A bank of development rights may be established by units of government in New York State for use in active land use districts when such reserve can be shown to be in the public interest and when such reserve shall serve defined and scheduled governmental purposes.

§239-jj. Hearings. Referrals. Appeals.

1. When a governing body acting under the provisions of this article is directed to hold a public hearing, it shall use the procedure as follows:

A public hearing shall be scheduled by the governing body directed to hold the hearing. Notice of the hearing shall be published at least twice in the newspaper or newspapers of general circulation in the locality or localities concerned not more than twenty days and again not less than ten days prior to such hearing.

At least four fifths of the total number of the membership of the governing body shall be present, or the governing body may designate one of their members from each political party represented in the body to act for the body at the hearing. Reports and background research as well as experts and specialists who designed the integrated district under question shall be present at the hearing.

At the hearing, the governing body or the designated representatives, who shall report to the full governing body, shall take into full consideration the comments of all complaining, supporting and interested parties. At its next meeting, the governing body shall assess the comments of the hearing and those of the referral agency. It may modify the integrated district if it chooses, or it shall modify the integrated district as directed by the referral agency before the district in question is established. The legislative body may then move to implement the integrated district.

2. Referrals.

a. Municipal integrated districts. Whenever the legislative body of a municipality shall state its intent to create integrated districts, it shall be referred to a county, metropolitan or regional planning agency as specified in section two hundred thirty-nine-m of the general municipal law.

b. Intermunicipal integrated districts. Whenever two or more municipalities within one county decide to create an intermunicipal integrated district, their stated intent shall be referred to a county, metropolitan or regional planning agency as specified in section two hundred thirty-nine-m of the general municipal law. The concerned municipalities may not act contrary to the referral agency's disapproval or recommended modifications. If the concerned municipalities dispute the referral agency's findings, they

may appeal as hereinafter provided.

c. County integrated districts. Whenever the governing body of a county shall declare its intent to create an integrated district which shall be within five hundred feet of the county's boundaries or shall cross the boundaries of two or more municipalities, such intent shall be referred to the designated state office. This state office shall confer with the proper regional planning board or commission and they shall together determine whether or not to approve the county's action. The state office shall within thirty days of referral transmit such determination and its full reasoning to the county.

d. Intercounty integrated districts. In the event that two or more counties shall jointly declare their intent to form an integrated district, they shall jointly follow the procedure provided herein for county districts, and they shall similarly be referred to the state office.

3. Appeals of decisions concerning actions to establish integrated districts may be made by aggrieved parties as follows:

a. If the complaining party was a participant in the initial hearing on establishment of the integrated district, and if the governing body did not act to accommodate the complaint when it acted to implement the district, the aggrieved party may transmit its complaint to the governing body in writing and request the matter be referred. The governing body must then refer the complaint and its proposal for establishment of the integrated district to the county planning agency if the matter concerns a municipal or intermunicipal district, and the governing body must refer the complaint and its proposal to the state office if the matter concerns a county or intercounty district.

The governing body must then act within the directives of the referral agency. If the aggrieved party still be unsatisfied, such party may seek judicial review of any administrative body or governmental subdivision hereunder pursuant to article seventy-eight of the civil practice law and rules.

b. If the complaining party is a governing body that acted to establish the integrated district, it shall designate from its membership representatives, one from each political party of that body, who will confer with the referral agency. The governing body shall direct its representatives to negotiate modifications on the proposed integrated district

with the referral agency and the bounds within which these negotiations may range. If the governing body accepts the negotiated modifications, it must formally adopt them before the integrated district may be established.

If the governing body finds these negotiations unacceptable, it may seek judicial review pursuant to article seventy-eight of the civil practice law and rules.

§3. Section two hundred ninety of the real property law is hereby amended to read as follows:

§290. Definitions; effect of article.

1. The term "real property" as used in this article includes lands and their development rights as such rights are defined in article twelve-G of the general municipal law, tenements, hereditaments and chattles real, except a lease for a term not exceeding three years.

§4. Section one hundred two of the real property tax law is hereby amended to read as follows:

§102. Definitions.

When used in this chapter, unless otherwise expressly stated or unless the context otherwise requires:

12. "Real property," "property" or "land" mean and include:

(a) Land itself above and under water, including development rights as such rights are defined in article twelve-G of the general municipal law, trees and undergrowth thereon and mines, minerals, quarries and fossils in and under the same, except mines belonging to the state:

§5. Section two hundred thirty-nine-m of the general municipal law is hereby amended to read as follows:

§239-m. Notice of certain proposed municipal zoning actions to be submitted to county, metropolitan or regional planning agency; report thereon; final action.

In any city, town or village which is located in a county which has a county planning board, commission or other agency, hereinafter referred to as a county planning agency, or, in the absence of a county planning agency, which is within the jurisdiction of a metropolitan or regional planning commission, board or other agency, duly created pursuant to the provisions of law, hereinafter referred to as a metropolitan or regional planning agency, each municipal body which has jurisdiction to adopt or amend zoning regulations, [or] to issue special permits or grant variances pursuant to such regulation, *or to establish integrated districts*, shall, before taking final action on certain of such matters, refer the same to such county metropolitan or regional planning agency. The term "special permit" shall be deemed to include any special permit, use permit, exception, or other special authorization which a board of appeals, planning board or legislative body is authorized to issue under the provisions of any zoning ordinance.

The matters covered by this section shall include:

- (a) any municipal zoning regulation, or any amendment thereof, which would change the district classification of or the regulations applying to real property lying within a distance of five hundred feet from the boundary of any city, village, or town, or from the boundary of any existing or proposed county or state park or other recreation area, or from the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway, or from the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines, or from the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; [and]
- (b) any special permit or variance affecting such real property within such distance of five hundred feet; and
- (c) *proposals of intent to establish municipal integrated districts or intermunicipal integrated districts*. The term "proposed" shall be deemed to include only those recreation areas, parkways, thruways, expressways, roads or highways which are shown on a county plan adopted pursuant to subdivision two of section two hundred thirty-nine-d of the general municipal law or adopted on an official map pursuant to section two hundred thirty-nine-g of such law.

Within thirty days after receipt of a full statement of such referred matter, the county, metropolitan or regional planning agency to which referral is made, or an authorized agent of said agency, shall report its recommendations thereon to the referring municipal agency, accompanied by

a full statement of the reasons for such recommendations. If such planning agency fails to report within such period of thirty days or such longer period as may have been agreed upon by it and the referring agency, the municipal body having jurisdiction to act may do so without such report. If such planning agency disapproves the proposal, or recommends modification [thereof] to the change in the municipal zoning regulation, or amendment thereof, or to the special permit or variance, the municipal agency having jurisdiction shall not act contrary to such disapproval or recommendation except by a vote of a majority plus one of all members thereto and after the adoption of a resolution fully setting forth the reasons for such contrary action. If such planning agency disapproves a proposal for the establishment of an integrated district, the municipality may appeal as provided in section two hundred thirty-nine-jj of the general municipal law.

Within seven days after final action by the municipal agency having jurisdiction on the recommendations, modifications or disapproval of a referred matter, such municipal agency shall file a report of the final action it has taken with the county, metropolitan or regional planning agency which has made the recommendations, modifications, or disapproval. If the matter pertained to an integrated district, such municipal agency shall notify all property owners who will be affected.

§6. The executive law is hereby amended by adding thereto a new article, to be article forty-one.

§900. Office for Land Use Review.

(1) There is hereby created within the executive department an office for land use review.

(2) The head of such office shall be an executive director who shall be appointed by the Governor, with the advice and consent of the Senate, and shall hold office during the pleasure of the Governor. The executive director shall receive an annual salary to be fixed by the Governor within the amount available therefore by appropriation. The director shall also be entitled to receive reimbursement for expenses actually and necessarily incurred by him in the performance of his duties.

(3) The executive director may appoint such officers, employees, agents, consultants and special committees as he may deem necessary, prescribe their duties, fix their compensation and provide for reimbursement of their expenses within the amounts available therefore by appropriation.

The executive director may promulgate, adopt, amend or rescind rules and regulations necessary to carry out the provisions of this article.

§901. General Powers and Duties.

The Office for Land Use Review shall have the following powers and duties:

(a) to advise and assist the Governor in developing policies designed to utilize and preserve land resources in the best interests of the people of New York State.

(b) to coordinate and assist the implementation of article twelve-G of the general municipal law.

(c) to advise, assist and expedite local government implementation of article twelve-G of the general municipal law.

(d) to monitor the adherence to the provisions of article twelve-G of the general municipal law in an advisory capacity, by those local governments which choose to implement such article.

(e) to consult with the appropriate regional planning agency or agencies in carrying out the purposes and duties hereunder.

§902. Review of Integrated Districts.

(1) The office for land use review shall review each proposed integrated district formed pursuant to article twelve-G of the general municipal law, to insure that such district meets the standards set forth in such article.

(2) The office shall insure that areas of regional, state, or national significance and importance are not adversely affected by the integrated districts formed by local governments.

(3) If the office disapproves of part of an integrated district, it shall recommend modifications to the concerned local government, and that local government shall implement such modifications before the integrated district may be established. If it disagrees with such modifications, it may appeal as provided in article twelve-G of the general municipal law. The office may disapprove entirely any proposed integrated district, and integrated districts thus disapproved may not be established.

§7. This act shall take effect immediately for the State of New York, for municipalities with a population of fifty thousand or more and all counties with a population of one hundred twenty-five thousand or more as enumerated by the census of population conducted by the bureau of the census of the United States in the year nineteen hundred seventy.

This act shall take effect for all other municipalities and all other counties on April first of the fourth year after passage.

Mr. Bartels is a professor of regional planning at Syracuse University's Maxwell School.

Mr. Dall is chairman of the Department of Managerial Science and Policy at the SUNY College of Environmental Science and Forestry.

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This report has been put on file with the National Technical Information Service of the U.S. Department of Commerce.

TESTING EMERGING LAND USE CONCEPTS
IN AN URBANIZING REGION

is a research study
conducted under the auspices of
the U.S. Forest Service of the Department of Agriculture,
The Rockefeller Foundation, and the
SUNY College of Environmental Science and Forestry
and conducted through the
Research Foundation of the State University of New York at
the SUNY College of Environmental Science and Forestry.

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COASTAL ZONE INFORMATION CENTER

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